THE CONSTITUTION

and what it means today

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By Edward S



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by

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PREFACE TO EDITION XI

Although *The Constitution and What It Means Today* utilizes now and then other materials decisions of the United States Supreme Court contribute its principal substance Of these the tenth edition covered pertinent holdings down to the close of the 1946 term that is to June 1947 while the present edition brings the treatment down approximately to the end of the 1953 term At the same time I have taken advantage of the publication by the Government Printing Office a year ago of *The Constitution of the United States of America Annotated Analysis and Interpretation* of which I was editor and have drawn upon its voluminous resources to elaborate somewhat my previous treatment of certain outstanding topics Thus while the tenth edition included 220 pages of text and notes (exclusive of other matter) the present edition runs to 285 pages of text and notes and while the Table of Cases in the former edition listed about 700 cases that of the present edition runs to over 1 000 cases

The general design and method of treatment which were adopted early in the evolution of *The Constitution and What It Means Today* are nevertheless still adhered to I have endeavored especially in connection with such important subjects as to judicial review the commerce clause executive power the war power national supremacy freedom of speech press and religion etc to accompany explanation of currently prevailing doctrine and practice with a brief summation of the historical development thereof The serviceability of history to make the present more understandable has been remarked upon by writers from Aristotle to the late Samuel Butler famed author of *Erewhon* and *The Way of All Flesh* and the idea is particularly pertinent to legal ideas and institutions

But while this is so it is impossible to overlook the fact that in consequence of the impact upon this country of a succession of national crises and of certain ideological forces in recent years the perspective in which our presently

viable Constitutional Law appears is frequently a considerably foreshortened one

The first of the crises referred to was the necessity which palpably confronted the official guardians of the Constitutions following the Presidential Election of 1936 of providing the New Deal safe habitation within the Constitutional fold a necessity which they met by returning to Chief Justice Marshall s sweeping conception of national supremacy thereby discarding the century old theory that the reserve powers of the States or atleast some of them formed an independent limitation on national power This retreat to Marshallian concepts comprises in fact the essence of the so called Constitutional Revolution of 1937 the record of which is to be found in volume 301 of the United States Reports How powerful and pervasive an organon of constitutional interpretation the doctrine of National Supremacy has since become was strikingly illustrated as recently as March 8 1954 by the holding of the Court in Adams v Maryland that Congress has power to bar the production in State course of Congressional inquiry

The second great crisis embraced our participation in two World Wars which for present purposes may be lumped together World War II being indeed only World War I writ large, when its principal outcome for our Constitutional law is assessed I mean a constantly augmented flow of discretionary power into the hands of the President In the Steel Seizure case to be sure the Court in 1952 professed to believe that it had found in the principle of the Separation of Powers a judicially enforceable concept in restraint of Presidential emergency power but as I point out later in this volume this was an empty gesture If nature abhors a vacuum so does an era of crisis and a vacuum is all that judicial Review has to offer in such a situation

Then as to the operation upon our present-day Constitutional Law of ideological forces the outstanding illustration is afforded by the tentative adoption in 1925 in the Gitlow ca e of the theory that the freedom which

are protected by Amendment I against Congress are available also against the States under the due process of law clause of Amendment XIV Two years later this theory became the rule of the Court and on the basis of it the Court today exercises a censorship of quite indefinite scope over local government action touching any and all social activities which involve speech or other modes of communication

Of the recent decisions covered by this volume the most notable one is that in the Desegregation cases which was handed down on May 17 It has three outstanding features First it was rendered by a unanimous Court Secondly it was not based on the history of the constitutional clause involved the equal protection clause of Amendment XIV This was held quite correctly to be a Delphic oracle, ambiguous equivocal So recourse was had to certain scientific studies of the effect of racial discrimination on its victims

Thirdly the Court postponed any effort to implement its decision on merits For the time being this is addressed primarily to the sensibilities of a world whose populations are everywhere fired by the notion of equality For it is this rather than the idea of liberty as would have been the case 100 years ago which lies at the basis of the insurgent nationalism of our time The problem of implementation nevertheless will have to be faced sooner or later It will not be surprising if ultimately Congressional legislation under Section V of the XIV Amendment will become necessary

In consequence of the annexation to Amendment XIV of much of the content of the Federal Bill of Rights and of the extension of national legislative power especially along the route of the commerce clause into the field of industrial regulation, with the result of touching State legislative power on more fronts than ever before Judicial Review as exercised by the Supreme Court takes on today increasingly the character of a species of arbitration between competing social interests rather than of adjudication

in the strict sense of the term namely the determination of the rights of adverse parties under a settled statable rule of law (*See* pp 49 52 217 219 248 251) In short Judicial Review as exercised by the Supreme Court today is often a political power in the broad sense of a power and duty to advance the best interests of the American community and its exercise involves the use of political judgment in the same broad sense To be sure this was more or less the case from the first today it is the case more rather than less one proof being the Court s own recognition of the weakness of the principle of *stare decisis* in the fi ld of Constitutional Law (*see* pp 144 145 and 253)

To sum the whole matter up comprehensiveness of coverage and doctrinal flexibility aided by the fact that the Court enjoys often a choice between comp ting doctrines—these are the dominant characteristics in this year of grace 1954 of our national Constitutional Law

EDWARD S CORWIN

June 25 1954

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Some Judicial Diversities

"In the Constitution of the United States—the most wonderful instrument ever drawn by the hand of man—there is a comprehension and precision that is unparalleled and I can truly say that after spending my life in studying it I still daily find in it some new excellence —Justice Johnson In Elkinson v Deliesseline 8 Federal Cases 593 (1823)

The subject is the execution of those great powers on which the welfare of a nation essentially depends This provision is made in a Constitution intended to endure for ages to come and consequently to be adapted to the various crises of human affairs —Chief Justice Marshall In McCulloch v Maryland 4 Wheaton 316 (1819)

It [the Constitution] speaks not only in the same words but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by th people of the United States Any other rule of construction would abrogate the judicial character of this Court and make it the mere reflex of the popular opinion or passion of the day —Chief Justice Taney In the Dred Scott Case 19 Howard 393 (1857)

We read its [the Constitution s] words not as we read legislative codes which are subject to continuous revision with the changing course of events but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government —Chief Justice Stone In United States v Classic 313 U S 299 (1941)

Judicial power as contradistinguished from the power of the laws has no existence Courts are the mere instruments of the law and can will nothing —Chief Justice Marshall In Osborn v U.S Bank 9 Wheaten 738 (1824)

We are under a Constitution but the Constitution is what the judges say it is —Former Chief Justice Hughes when Governor of New York

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When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional manda.e the

Judicial branch of the Government has only one duty —to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former —Justice Roberts In United States v Butler 297 U S 1 (1936)

While unconstitutional exercise of power by the executive and legislative branches of the Government is subject to judicial restraint the only check on our own exercise of power is our own sense of self restraint "—Justice Stone (dissenting) *Ibid*

The glory and ornament of our system which distinguishes it from every other government on the face of the earth is that there is a great and mighty power hovering over the Constitution of the land to which has been d legated th awful responsibility of restraining all the coordinate departments of government within the walls of the government fabric which our fathers built for our protection and immunity —Chief Justice Edward Douglass White when senator from Louisiana *In Con ressional Pecord* 52nd Cong and Sess p 6516 (1894)

Judicial review itself a limitation on popular government is a fundamental part of our constitutional scheme But to the legislature no less than to courts is committed the guardianship of d eply cherished constitutional rights —Justice Frankfurter In Minnersville S hool Dist v Gobitis 310 U S 586 (1940)

THE PREAMBLE

WE THE PEOPLE OF THE UNITED STATES IN ORDER TO FORM A MORE PERFECT UNION ESTABLISH JUSTICE INSURE DOMESTIC TRANQUILLITY PROVIDE FOR THE COMMON DEFENSE PROMOTE THE GENERAL WELFARE AND SECURE THE BLESSINGS OF LIBERTY TO OURSELVES AND OUR POSTERITY DO ORDAIN AND ESTABLISH THIS CONSTITUTION FOR THE UNITED STATES OF AMERICA

THE Preamble strictly speaking is not a part of the Constitution but walks before it By itself alone it can afford no basis for a claim either of governmental power or of private right [1] It serves nevertheless two very important ends first it indicates the source from which the Constitution comes from which it derives its claim to obedience namely the people of the United States secondly it states the great objects which the Constitution and the Government established by it are expected to promote national unity justice peace at home and abroad liberty and the general welfare [2]

We the people of the United States in other words We the citizens of the United States whether voters or non voters [3] In theory the former represent and speak for the latter actually from the very beginning of our national history the constant tendency has been to extend the voting privilege more and more widely until today with the establishment of woman s suffrage by the addition of the

[1] Jacobson v Mas 197 U S 11 (1905)

Its true office says Story is to expound the nature and extent and application of the powers actually conferred by the Constitution and not substantively to create them *Commentaries on th Constitution* §462

[3] The words people of the United States and citizens are synonymous terms and mean the same thing They both describe the political body who according to our republican institutions form the sovereignty and who hold the power and conduct the government through their representatives They are what we familiarly call the sovereign people and every citizen is one of this people and a constituent member of this sovereignty C J Taney in Dred S ott v Sanford 19 How at p 404 (1857) On the relationship between citizenship and voting *see* C J Chase in Minor v Happersett 21 Wall 162 (1874)

Nineteenth Amendment to the Constitution (*see* p 279), the terms voter and citizen have become practically interchangeable as applied to the adult American

Do ordain and establish not *did* ordain and establish As a *document* the Constitution came from the generation of 1787 as a *law* it derives its force and effect from the present generation of American citizens and hence should be interpreted in the light of present conditions and with a view to meeting present problems[4]

The term United States is used in the Constitution in various senses (*see e g* Article III Section III) In the Preamble it signifies as was just implied the States which compose the Union and whose voting citizens directly or indirectly choose the government at Washington and participate in amending the Constitution[5]

The Framework of Government Articles I, II and III set up the framework of the National Government in accordance with the doctrine of the Separation of Powers of the celebrated Montesquieu which teaches that there are three and only three functions of government the legislative the executive and the judicial and that these three functions should be exercised by distinct bodies of men in order to prevent an undue concentration of power Latterly the importance of this doctrine as a working principle of government under the Constitution has been much diminished by the growth of Presidential leadership in legislation by the increasing resort by Congress to the practice of delegating what amounts to legislative power to the President and other administrative agencies and by the mergence in the latter of all three powers of government according to earlier definitions thereof[6]

[4] *See* the words of Chief Justice Marshall in 4 Wheat 316 421 (1819)

[5] The most comprehensive discussion of this subject is that by counsel and the Court in Downes *v* Bidwell the chief of the famous Insular Cases of 1901 *See* 182 U S 244 (1901)

[6] So broad a principle as the doctrine of the Separation of Powers has naturally received at times rather conflicting interpretations occasionally from the same judges *Cf* in this connection C J Taft s opinion for the Court in *Ex parte* Grossman 267 U S at pp 119 1 0 (1925) with the same Justice s opinion in Myers *v* U S 272 U S at p 116 (1926) *also* J Black for the Court in Youngstown Sheet and Tube Co 343 U S 579 at pp 581 585 589 with C J Vinson for the minority *ibid* 683 700 (1952)

ARTICLE I

Article I defines the legislative powers of the United States, which it vests in Congress

SECTION I

¶ All legislative powers herein granted shall be vested in a *Congress of the United States which shall consist* of a Senate and House of Representatives

This seems to mean that no other branch of the Government except Congress may make laws but as a matter of fact by Article VI ¶2 treaties which are made under the authority of the United States have for some purposes the force of laws and the same has on a few occasions been held to be true of executive agreements entered into by the President by virtue of his diplomatic powers[1] Also of course judicial decisions make law since later decisions may be by the principle of *stare decisis* based upon them Indeed the Supreme Court by its decisions interpreting the Constitution constantly alters the practical effect and application thereof As Woodrow Wilson aptly put it the Supreme Court is a kind of Constitutional Convention in continuous session Likewise regulations laid down by the President heads of departments or administrative bodies like the Interstate Commerce Commission the Securities and Exchange Commission and so on are laws and will be treated by the courts as such when they are made in the exercise of authority validly delegated by Congress

Law in the Constitution

From this section in particular is derived the doctrine that the National Government is one of enumerated powers a doctrine which was given classic expression by Chief Justice Marshall in 1819 in the following words This government is acknowledged by all to be one of enumerated powers The principle that it can exercise only the powers granted to it would seem too apparent, to have required to be enforced by all those arguments which its

A Government of Enumerated Powers

[1] B Altman & Co v U S 224 U S 583 (1912) United States v Belmont 301 U.S 324 (1937) United States v Pink 315 U S 203 (1942) *Cf* Tucker v Alexandroff 183 U S 424 both opinions (1902)

enlightened friends while it was depending before the people found it necessary to urge that principle is now universally admitted [2] The doctrine is today subject to many exceptions In 1828 Marshall himself held that the Constitution confers absolutely on the government of the Union the powers of making war and of making treaties consequently that government possesses the power of acquiring territory either by conquest or by treaty [3] And *from the power to acquire territory he continued arose* as the inevitable consequence the right to govern it [4] Subsequently powers have been repeatedly ascribed to the National Government by the Court on grounds which ill accord with the doctrine of enumerated powers the power to legislate in effectuation of the rights expressly given and duties expressly enjoined by the Constitution [5] the power to impart to the paper currency of the Government the quality of legal tender in the payment of debts [6] the *power to acquire territory by discovery* [7] *the power to* legislate for the protection of the Indian tribes wherever situated in the United States [8] the power to exclude and deport aliens [9] and to require that those who are admitted be registered and fingerprinted [10] and finally the complete powers of sovereignty both those of war and peace in the conduct of foreign relations [11]

Also ascribable to Section I is the doctrine that the legislature (*i e* Congress) may not delegate its powers which was once expounded by Chief Justice Taft as follows The well known maxim *Delegata potestas non*

[2] McCulloch *v* Md 4 Wheat 316 405 (1819)

[3] 1 Pet 511 542 (1828) [4] *Ibid* 543

[5] *Prigg v Pa 16 Pet 536 616 618 619 (1842)*

[6] Juilliard *v* Greenman 110 U S 421 449-450 (1884) *See also* J Bradley s concurring opinion in Knox *v* Lee 12 Wall 457 565 (1871)

[7] United States *v* Jones 109 U S 513 (1883)

[8] United States *v* Kagama 118 U S 375 (1886)

[9] Fong Yue Ting *v* U S 149 U S 698 (1893)

[10] Hines *v* Davidowitz *et al* 312 U S 52 (1941)

[11] United States *v* Curtiss Wright Export Corp 299 U S 304 315 316 318 *passim* (1937) For anticipations of this conception of the powers of the National Government in the field of foreign relations *see* Penhallow *v* Doane 3 Dall 54 80 81 (1795) *also ibid* 74 and 76 (argument of counsel) *also* Chief Justice Taney s opinion in Holmes *v* Jennison 14 Pet 540 575 576 (1840)

sential to their satisfactory performance of their legislative role Some of these are conferred upon them in specific terms in the following sections some are inherent or more strictly speaking are *inherited* The subject is treated below

SECTION II

The House of Representatives

¶1 The House of Representatives shall be composed of members chosen every second year by the people of the several States and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature

Electors are voters The right here conferred is extended by Amendment XVII to the choice of Senators While the enjoyment of this right is confined by these provisions to persons who are able to meet the requirements prescribed by the States for voting provided these do not transgress the Constitution (*e g* Amendments XV and XIX) yet the right itself comes not from the States but from the Constitution and so is a privilege and immunity of national citizenship about the exercise of which Congress may throw the protection of its legislation and which under Section I of the Fourteenth Amendment no State may abridge [1] Is the limitation of the right to vote to persons who have paid a poll tax such an abridgement because of its restrictive operation on the right to vote for members of Congress? Some people contend that it is but in the single case challenging the validity of the poll tax requirement the Court unanimously sustained it as a constitutional qualification for voting in State elections a holding which logically settles the question of the requirement s validity for voting in Congressional elections [2]

[1] *Ex parte* Yarbrough 110 U S 651 (1884) United States *v* Classic 313 U S 299 (1941) United States *v* Saylor 322 U S 385 (1944)

[2] Breedlove *v* Suttles 302 U S 277 (1937) The opponents of the poll tax make a good deal of dictum by *J* Jackson in his concurring opinion in Edwards *v* Calif , 314 U S at p 185 (1941) They are also apt to contend that voting in a Congressional election is a ' federal function the performance of which a State may not tax but even conceding the function theory the Constitution still cofines it in the case of Congressional elections to those who are entitled to vote in State elections

¶2 No person shall be a Representative who shall not have attained the age of twenty five years and been seven years a citizen of the United States and who shall not when elected be an inhabitant of that State in which he shall be chosen

It was early established in the case of Henry Clay who was elected to Senate before he was thirty years of ege that it is sufficient if a Senator possesses the qualifications of that office when he takes his seat and the corresponding rule has always been applied to Representatives as well [3]

An inhabitant is a resident Custom alone has established the rule that a Representative must be a resident of the *district* from which he is chosen [4]

¶3 Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers which shall be determined by adding to the whole number of free persons including those bound to service for a term of years and excluding Indians not taxed three fifths of all other persons The actual enumeration shall be made within three years after the first meeting of the Congress of the United States and within subsequent term of ten years in such manner as they shall by law direct The number of Representatives shall not exceed one for every thirty thousand but each State shall have at least one Representative and until such enumeration shall be made the State *New Hampshire* shall be entitled to choose three *Massachusetts* eight *Rhode Island and Providence Plantations* one *Connecticut* five *New York* six *New Jersey* four *Pennsylvania* eight *Delaware* one *Maryland* six *Virginia* ten *North Carolina* five *South Carolina* five and *Georgia* three

This paragraph embodies one of the famous compromises of the Constitution The term three fifths of all other persons meant three fifths of all slaves Amendment XIII has rendered this clause obsolete and Amendment XIV Section II has superseded it

[3] Sen Rep 904 74th Congress 1st Sess (1935) 79 Cong. Rec 9651 9653 (1935)

[4] Hindus *Precedents of the House of Representatives* §414 (1907)

¶5 The House of Representatives shall choose their Speaker and other officers and shall have the sole power of impeachment

The powers of the Speaker have varied greatly at different times They depend altogether upon the rules of the House

The subject of impeachment is dealt with at the end of the next section

SECTION III

¶1 The Senate of the United States shall be composed of two Senators from each State chosen by the legislature thereof for six years and each Senator shall have one vote

The Senate, a Continuing Body

This paragraph has been superseded by Amendment XVII

¶2 Immediately after they shall be assembled in consequence of the first election they shall be divided as equally as may be into three classes The seats of the Senators of the first class shall be vacated at the expiration of the second year of the second class at the expiration of the fourth year and of the third class at the expiration of the sixth year so that one third may be chosen every second year and if vacancies happen by resignation or otherwise during the recess of the legislature of any State the executive thereof may make temporary appointments until the next meeting of the legislature which shall then fill such vacancies

This paragraph explains how it came about that one third of the Senators retire every two years as well as why the Senate is a continuing body [1] While there have been 84 Congresses to date there has been only one Senate and this will apparently be the case till the crack of doom

The final clause of this paragraph also has been superseded by Amendment XVII

¶3 No person shall be a Senator who shall not have attained to the age of thirty years and been nine years a citizen of the United States and who shall not when elected be an inhabitant of that State for which he shall be chosen

Following the precedent set in the case of Henry Clay

[1] McGrain v Daugherty 273 U S 135 181 182(1927)

mentioned above it is not necessary for a person to possess these qualifications when he is chosen Senator it is sufficient if he has them when he takes the oath of office and enters upon his official duties[2]

¶4 The Vice President of the United States shall be President of the Senate but shall have no vote unless they be equally divided

The Casting Vote of the Vice President

This is the source of the casting vote of the Vice President which has been decisive on more than one critical occasion Indeed John Adams our first Vice President thus turned the scales in the Senate some twenty times one of them being the occasion when the President was first conceded the power to remove important executive officers of the United States without consulting the Senate with whose advice and consent they are appointed[3] All other powers of the Vice President as presiding officer depend upon the rules of the Senate or his own initiative In early days they were considerably broader than today

¶5 The Senate shall choose their other officers and also a President *pro tempore* in the absence of the Vice President or when he shall exercise the office of President of the United States

(See Article II Section I ¶6)

The Impeachment Power

¶6 The Senate shall have the sole power to try all impeachments When sitting for that purpose they shall be on oath or affirmation When the President of the United States is tried the Chief Justice shall preside and no person shall be convicted without the concurrence of two thirds of the members present

Impeachments are charges of misconduct in office and are comparable to presentments or indictments by grand jury They are voted by the House of Representatives by a majority vote that is a majority of a quorum (*see* Section V ¶ 1)

[2] *See* disposition of Senator Rush D Holt s case Senate proceedings *Congressional Record* April 18 and June 19 and 20 1935

[3] *Life and Works of John Adams* 1 448-450 (Boston 1856)

The persons subject to impeachment are "civil officers of the United States" (*see* Article II Section IV) which term does not include members of the House or the Senate (*see* Article I Section VI ¶2) who however are subject to discipline and expulsion by their respective houses (*see* Section V, ¶2)

The charge of misconduct must amount to a charge of "treason bribery or other high crimes and misdemeanors" (*see* Article II Section IV) but the term "high crimes and misdemeanors" is used in a broad sense being equivalent presumably to lack of that "good behavior" which is specifically required of judges (*see* Article III Section I) It is for the House of Representatives to judge in the first instance and for the Senate to judge finally whether alleged misconduct on the part of a civil officer of the United States falls within the terms "high crimes and misdemeanors" and from this decision there is no appeal

In 1803 District Judge Pickering was removed from office by the process of impeachment on account of drunkenness and other unseemly conduct on the bench The defense of insanity was urged in his behalf but unsuccessfully One hundred and ten years later Judge Archbald of the Commerce Court was similarly removed for soliciting for himself and friends valuable favors from railroad companies some of which were at the time litigants in his court and in 1936 Judge Ritter of the Florida District Court was removed for conduct in connection with a receivership case which raised serious question of his integrity although on the specific charges against him he was acquitted[4]

When trying an impeachment the Senate sits as a court but has full power in determining its procedure and is not required to disqualify its members for alleged prejudice or interest However when the President of the United States is tried the Chief Justice shall preside the idea being no doubt to obviate the possibility of bias and unfair-

[4] W S Carpenter *Judicial Tenure in the United States* 145 152 (New Haven 1918) Senate proceedings in *Cong Record* April 16 1936

ness on the part of the Vice President who would succeed to the President s powers if the latter was removed

Two thirds of the members present logically implies two thirds of a quorum at least (*see* Section V ¶1)

¶7 Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor trust or profit under the United States but the party convicted shall nevertheless be liable and subject to indictment trial judgment and punishment according to law

The House has impeached twelve civil officers of the United States of whom the Senate convicted four The two most famous cases of impeachment were those of Supreme Court Justice Samuel Chase (1802) and of President Andrew Johnson (1868) both of which failed All of those who have been convicted were judges of inferior federal courts In several instances however federal officers have resigned to escape impeachment or trial [4a]

Since conviction upon impeachment does not constitute jeopardy of life or limb (*see* Amendment V) a person ousted from office by process of impeachment may still be reached by the ordinary penalties of the law for his offense if it was of a penal character [5]

On account of the cumbersomeness of the impeachment proceeding and the amount of time it is apt to consume it has been proposed that a special court should be created to try cases of alleged misbehavior in office especially of inferior judges of the United States There can be little doubt that Congress has power to establish such a court and to authorize such proceedings [6]

[4a] Corwin and Peltason *Understanding the Constitution* (New York 1949) p 11

[5] *Foster on the Constitution* I 505*ff* (Boston 1895) This work of which only the first volume was ever published contains a valuable although considerably out-of-date discussion of the entire subject of impeachment under the Constitution.

[6] Burke Shartel Federal Judges etc 28 *Michigan Law Review* 870-907 s eech of Senator Wm. G McAdoo *Cong Record* April 23 1936

SECTION IV

¶1 The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof but the Congress may at any time by law make or alter such regulations except as to the places of choosing Senators

Congressional Regulation of Elections

This is one of the few clauses of the Constitution to delegate power to the States Legislature here means the State legislature acting in its *law making* capacity and consequently subject to the governor s veto where this exists under the State constitution [1] as it does today in all the States except North Carolina Until 1842 State regulation of Congressional elections went unaltered by Congress and Representatives were frequently chosen on State wide tickets By an act passed that year Congress imposed the district system on the States and by one passed in 1911 added further requirements Representatives must be elected by districts composed of a compact and contiguous territory and containing as nearly as practicable an equal number of inhabitants [2] These provisions no longer govern having been omitted from the Act of June 18 1929 (*see* p 8) As a result remarkable disparities in population exist at times even as between districts in the same State The Seventh Illinois district for example contains over 900 000 inhabitants as against only 112 000 in the fifth Illinois district Thus a single vote in the latter district counts more than eight votes do in the former in the choice of a Representative It is by no means beyond the realm of possibility that the Supreme Court may be brought to hold in a properly got up case that State legislation sanctioning such disparities violates the equal protection clause of Amendment XIV [3]

Under earlier legislation which the Act of 1929 leaves

[1] Smiley v Holm 285 U S 355 (1932)

U S Code tit 2 c 1 Wood v Brown 287 U S 1 (1932)

[3] *See* Colegrove v Green 328 U S 549 (1946) and cases there cited *also* Joel Francis Paschal The House of Representatives Grand Depository of the Democratic Principle? *Law and Contemporary Problems* (Duke University *Spring issue 1952*) 276-289

unimpaired, unless the State constitution specifies some other date—and Maine is the only State still falling within this exception—elections for members of the House take place on the Tuesday following the first Monday of November of the even years and votes must be by written or printed ballot or by voting machine where this method is authorized by State law [4]

Party Primaries as Elections

May Congress by way of regulating the manner of holding elections limit the expenditures of candidates for *nomination or election to Congress? In the Newberry* case [5] which concerned a Candidate for the Senate four members of the Supreme Court took the view that the above quoted words referred only to the last formal act whereby the voter registers his choice, and so answered this question no but a fifth Justice who with these constituted the majority of the Court on this occasion expressly confined his opinion to the state of Congress s power before the adoption of the Seventeenth Amendment when the election of Senators being by the State legislatures was much more evidently separable from the preliminary stages of candidacy than it is today In United States *v* Classic[6] the Court ruled in 1941 that certain Louisiana election officials who were charged with tampering with ballots cast in a primary election for Representative had been properly indicted under the United States Criminal Code for conspiring to deprive citizens of the United States of a right secured to them by the Constitution namely the right to participate in the choice of Representatives in Congress This was held to include not only the right of the elector to cast a ballot and to have it counted at the general election whether for the successful candidate or not but also

[4] U S Code tit 2 c 1 A bill introduced into the House by the Hon. Hatton Sumners of Texas February 28 1940 would have changed the date of election of Senators and Representatives and of appointment of Presidential Electors to the Tuesday following the first Monday in October Some such change seems to be required by the going into effect of Amendment XX but so far the only action Congress has taken is to put forward the meeting of the Presidential Electors in their respective States and the counting of their votes by Congress

[5] Newberry *v* U.S 256 U S 232 (1921)

[6] 313 U.S 299

his right to have his vote counted in the primary in cases where the State law has made the primary an integral part of the procedure of choice or where the primary effectively controls the choice Three Justices dissented on a question of statutory interpretation but took pains to voice their belief that Congress may regulate primaries at which candidates for the Senate and House are selected a position which is further bolstered by later holdings that the Fifteenth Amendment protects the right to vote in party primaries[7] Years earlier moreover the Court had asserted that the National Government must simply by virtue of its republican character possess power to protect the elections on which its existence depends from violence and corruption a sentiment which it reiterated and emphasized in 1934 with the Newberry Case before it[8]

¶2 The Congress shall assemble at least once in every year and such meeting shall be on the first Monday in December unless they shall by law appoint a different day

This provision has been superseded by Amendment XX—the so called Norris "Lame Duck Amendment

SECTION V

Powers of the Houses over Members

¶1 Each house shall be the judge of the elections returns and qualifications of its own members and a majority of each shall constitute a quorum to do business but a smaller number may adjourn from day to day and may be authorized to compel the attendance of absent members in such manner, and under such penalties as each house may provide

The power conferred by this paragraph carries with it authority to take all necessary steps to secure information which may form the basis of intelligent action including the right to summon witnesses and compel them to an

[7] Smith v Allwright 321 U S 649 (1944) Terry v Adams 345 U.S 461 (1953)

[8] *Ex parte* Yarbrough 110 U.S 651 (1884) Burroughs v U S 290 U.S 534 (1934) The right to have a vote counted means the right to have it counted honestly United States v Mosley 238 U S 383 (1915) United States v Saylor 322 U.S 385 (1944)

ancy[1] as well as the right to delegate such powers to a committee. And whenever either house doubts the qualifications of one claiming membership it may during investigation suspend him or even refuse to swear him in.

Nor do the "qualifications" here referred to consist solely of the qualifications prescribed in Sections II and III above for Representatives and Senators respectively. Congress, it has been said, "may impose disqualifications for reasons that appeal to the common judgment of mankind." In 1900 the House of Representatives excluded a Representative from Utah as "a notorious, demoralizing, and audacious violator of State and Federal laws relating to polygamy and its attendant crimes";[2] while in 1928 the Senate refused to seat a Senator-elect from Illinois on the ground that his acceptance of certain sums in promotion of his candidacy had been "contrary to sound policy, harmful to the dignity of the Senate, dangerous to the perpetuity of free government, and had tainted his credentials with fraud and corruption."[3]

The circumstance that refusal by the Senate to seat one claiming membership must cause a State to lose its equality of representation in that body for a time is a fact of no importance constitutionally, equality of representation being guaranteed merely as against the power to amend the Constitution.[4]

¶2. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

It is by virtue of its power to "determine the rules of its proceedings" that the Senate has been able to develop that most peculiar institution, the filibuster. The core of the filibuster is the right of any Senator who can secure recog-

[1] Barry v. U.S., 279 U.S. 597 (1929).

[2] J. A. Woodburn, *The American Republic and Its Government*, 247 (New York, 1903).

[3] *Cong. Record*, December 1927–January 1928. On the privileges and procedure of the House generally, and supporting precedents, see Hinds' *Precedents of the House of Representatives*, etc. (8 vols., Washington, 1907–1908).

[4] *Barry v. U.S.*, just cited.

nition from the Chair to talk on any subject that may enter his head however remote it may be from the business under way for as long as his legs will hold him up A few years ago this unique institution seemed to be losing ground Indeed in 1917 the Senate for the first time in its history adopted a mitigated cloture rule Unfortunately things have recently taken a turn for the worse Thus in 1948 the late Senator Vandenberg ruled in his capacity as President *pro tem* that a motion to change the Senate s rules required the affirmative vote of two thirds of the entire Senate membership and this ruling was presently adopted by the Senate as Rule 22 Asked last January 5 for a clarification of this rule Vice President Nixon expressed the opinion that it was unconstitutional inasmuch as it denied the membership of the Senate the power to make its own rules He acknowledged however that only the Senate could decide the issue And this is how the matter stands at present By virtue of its power to make its own rules the Senate has adopted a practice that nullifies this power[5]

The power of each House over its proceedings

In the exercise of their constitutional power to determine their rules of proceedings the Houses of Congress may not ignore constitutional restraints or violate fundamental rights and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained But within these limitations all matters of method are open to the determination of the House The power to make rules is not one which once exercised is exhausted It is a continuous power always subject to be exercised by the House and within the limitations suggested absolute and beyond the challenge of any other body or tribunal [5] But when a rule affects private rights the construction thereof may become a judicial question In Christoffel *v* United States[6] a sharply divided Court upset a conviction for perjury in

[5]See Franklin Burdette *Filibustering in the Senate* 6 61 111 112 227 229 232 233 237 238 (Princeton University Press 1940) also the present writer s *President Office and Powers* (New York University Press, 4th Ed. 1957) 477 79

[6]338 U S 84 (1949)

the district courts of one who had denied under oath before a House Committee any affiliation with Communism The reversal was based on the ground that inasmuch as a quorum of the committee while present at the outset was not present at the time of the alleged perjury testimony before it was not before a competent tribunal within the sense of the District of Columbia Code

The Legislative Reorganization Act of 1946 stems in part from the powers here conferred on the houses individually[7] So far as it purports to limit such powers the measure would seemingly amount to a sort of gentleman s agreement rather than a true law[8]

¶3 Each house shall keep a journal of its proceedings and from time to time publish the same excepting such parts as may in their judgment require secrecy and the ayes and nays of the members of either house on any question shall at the desire of one fifth of those present be entered on the journal

The obvious purpose of this paragraph is to make it possible for the people to watch the official conduct of their Representatives and Senators It may be and frequently is circumvented by the house resolving itself into committee of the whole to whose proceedings the provision is not regarded as applying[9]

¶4 Neither house during the session of Congress shall without the consent of the other adjourn for more than three days nor to any other place than that in which the two houses shall be sitting

Legislative Contempts

In addition to the powers enumerated above each house also possesses certain inherent powers which are implied in fact that it is a deliberative body or which were inherited *via* the early State legislatures from the Parlia

[7] 79th Cong Public Law 601

[8] Some of the provisions of Public Law 19 76th Cong 1st sess raise similar questions *See Cong Record* for March 16 1938

[9] On the availability of the Journal as evidence concerning the presence of a quorum the passag of an act and collateral question *see* United States v Ballin 144 U S 1 4 (1892) Field v Clark 143 U S 649 (1892) and Flint v Stone Tracy Co 220 U S 107 143 (1911)

ment of Great Britain Each house may pass resolutions either separately or concurrently' with the other house with a view to expressing its opinion on any subject whatsoever and may create committees to deal with the matters which come before it Also each house has certain powers of a judicial character ever outsiders If a stranger rudely interrupts or physically obstructs the proceedings of one of the houses he may be arrested and brought before the bar of the house involved and punished by the vote of its members for contempt but if the punishment takes the form of imprisonment it terminates with the session of the house imposing it Also each house has full powers to authorize investigations by committees looking to possible action within the scope of its powers or of those Congress as a whole which committees have the right to examine witnesses and take testimony and if such witnesses prove recalcitrant they too may be punished for contempt though in this case the punishment is nowadays imposed under an Act of Congress passed in 1857 by the Supreme Court of the District of Columbia for misdemeanor But it is not within the power of either house to pry into the purely personal affairs of private individuals or to investigate them for the purpose of exposing them or to deprive them of freedom of speech press and association and whether in a particular investigation a committee of Congress has attempted to do any of these things rests with the Supreme Court to say [10] Indeed in the last case just cited the Court goes so far as to suggest that it is entitled to rule whether a question put to a person under investigation by a Congressional Committee was relevant It can be rather confidently predicted that Congress will not indefinitely permit its primitive power of inquiry to remain in judicial leading strings

The Investigatory Power

[10] On this topic *cf* Anderson *v* Dunn 6 Wheat 204 (1821) Kilbourn *v* Thompson 103 U S 168 (1880) *in re* Chapman 166 U S 661 (1897) Marshall *v* Gordon 243 U S 521 (1917) McGrain *v* Daugherty 273 U S 135 (1927) (Jurney *v* McCracken 294 U S 125 (1935) 2 U S Code, §192 United States *v* Bryan 339 U S 323 (1950) Watkins *v* United States, decided June 17 1957

SECTION VI

Privileges and Immunities of Members

¶1 The Senators and Representatives shall receive a compensation for their services to be ascertained by law and paid out of the Treasury of the United States They shall in all cases except treason felony and breach of the peace be privileged from arrest during their attendance at the session of their respective houses and in going to and returning from the same and for any speech or debate in either house they shall not be questioned in any other place

While treason felony and breach of the peace cover violations of State as well as national laws the immunity from arrest here conferred does not include immunity from service of summons in a civil suit nor by reasoning and authority from being required to testify before a Congressional committee[1] Indeed since abolition of imprisonment for debt the immunity has lost most of its importance

The provision concerning speech or debate not only removes every restriction upon freedom of utterance on the floor of the houses by members thereof except that supplied by their own rules of order but applies also to reports and resolutions which though in writing may be reproduced in speech and in short to things generally done in a session of the House by one of its members in relation to the business before it[2] Nor will the claim of an unworthy purpose suffice to destroy the privilege One must not expect uncommon courage even in legislators[3] For their utterances elsewhere than in their respective houses members of Congress are of course subject to the same legal restraints as other people

Disabilities of Members

¶2 No Senator or Representative shall during the time for which he was elected be appointed to any civil office under the authority of the United States which shall have

[1] *See* Long v Ansell 293 U S 76 (1934) and cases there cited

[2] Kilbourn v Thompson 103 U S at pp 203 204 (1880) citing and quoting from C J Parsons famous opinion in Coffin v Coffin 4 Mass 1 (1808)

[3] J Frankfurter for the Court in Tenney v Brandhove 341 U S 367 377 (1951)

been created or the emoluments whereof shall have been increased during such time and no person holding any office under the United States shall be a member of either house during his continuance in office

Despite this paragraph Presidents have frequently appointed members of the houses as commissioners to act in a diplomatic capacity but as such posts whether created by act of Congress or not carried no emoluments and were only temporary they were not it would seem, offices in the sense of the Constitution [4]

The first clause became a subject of discussion in 1937 when Justice Black was appointed to the Supreme Court in face of the fact that Congress had recently improved the financial position of Justices retiring at seventy and the term for which Mr Black had been elected to the Senate from Alabama in 1932 had still some time to run The appointment was defended by the argument that inasmuch as Mr Black was only fifty one years old at the time and so would be ineligible for the increased emolument for nineteen years it was not *as to him* an increased emolument Similarly when in 1909 Senator Knox of Pennsylvania wished to become Secretary of State in President Taft s Cabinet the salary of which office had been recently increased Congre s accommodatingly repealed the increase for the period which still remained of Mr Knox s Senatorial term In other words a Senator or Representative—and especially a Senator—may during the time for which he was elected be appointed to any civil office under the authority of the United Stated the emoluments whereof shall have been increased during such time *provided only* that the increase in emolument is not available to the appointee during such time

Cabinet versus "Presidential" system

The second clause derives from an act of Parliament passed in 1701 which sought to reduce the royal influence by excluding all placemen from the House of Commons The act however so cut the Commons off from direct knowledge of the business of government that it was largely

[4] United States v Hartwell 6 Wall 385 393 (1867) *Cf Willoughby on the Constitution* I 605 607 (New York 1929)

repealed within a few years and so the way was paved for the British "Cabinet System" wherein the executive power of the realm is placed in the hands of the leaders of the controlling party in the House of Commons Conversely, the revival of the provision in the Constitution in conformity with the doctrine of the Separation of Powers lies at the basis of the American Presidential System in which the business of legislation and that of administration proceed largely in *formal* though not *actual* independence of each other (*See* however Article II Section II, ¶1, and Section III)

SECTION VII

¶1 *All bills for raising revenue shall originate in the House* of Representatives but the Senate may propose or concur with amendments as on other bills

The House has frequently contended that this provision covers appropriation as well as taxation measures and also bills for repealing revenue acts[1] Although in practice most appropriation as wall as *all* taxation measures do originate in the House the provision is otherwise negligible inasmuch as the Senate may amend any bill from the House by substituting an entirely new measure under the enacting clause

The Veto Power

¶2 Every bill which shall have passed the House of Representatives and the Senate shall before it become a law be presented to the President of the United States if he approve he shall sign it but if not he shall return it *with his objections to that house in which it shall have* originated who shall enter the objections at large on their journal and proceed to reconsider it *If* after such reconsideration two thirds of that house shall agree to pass the bill it shall be sent together with the objections to the other house by which it shall likewise be reconsidered and if approved by two thirds of that house it shall become a law But in all such cases the votes of both houses shall be determined by yeas and nays and the names of the persons voting for and

[1] R. E. Cushman *American National Government* 478-481

against the bill shall be entered on the journal of each house respectively If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it unless the Congress by their adjournment prevent its return in which case it shall not be a law

A bill which has been duly passed by the two houses may become law in any one of three ways first with the approval of the President which it has been generally assumed must be given within ten calendar days Sundays excepted after the *presentation* of the bill to him—not after its passage secondly without the President s approval if he does not return it with his signature within ten calender days Sundays excepted after such presentation thirdly despite his disapproval if it is repassed by two thirds of each house that is two thirds of a quorum of each house[2] (*see* Section V ¶ 1)

Bills which have been passed within ten days of the end of a session may be kept from becoming law by a pocket veto that is by the President s failing to return them till an adjournment of Congress has intervened nor does it make any difference that the adjournment was not a final one for the Congress which passed the bill but a merely *ad interim* one between sessions[3] Likewise the President may effectively sign a bill at any time within ten calendar days of its presentation to him Sundays excepted, even though Congress has adjourned in the meantime whether finally or for the session[4] and on the other hand he may return a bill with his objections to the house of its origin *v a* an appropriate officer thereof while it is in recess in accordance with ¶4 of Section V above[5]

The fact that the President has ten days from their presentation rather than their *passage* within which to sign bills became a matter of great importance when President Wilson went abroad in 1919 to participate in the making of the Treaty of Versailles Indeed by a curious combina

[2] Missouri Pac Ry Co v Kan 248 U S 276 (1919)
[3] Okanogan Indians v U S 279 U S 655 (1920)
[4] Edwards v U S 286 U S 482 (1932),
[5] Wright v U S, 302 U S 583 (1938)

tion of circumstances plus a little contriving the late President Roosevelt was enabled on one occasion to sign a bill no less than twenty three days after the adjournment of Congress[6]

Before President Jackson's time it was generally held that the President ought to reserve his veto power for measures which he deemed to be unconstitutional Today the President exercises this power for any reason that seems good to him[7]

The Concurrent Resolution

¶3 Every order resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States and before the same shall take effect shall be approved by him or being disapproved by him shall be repassed by two thirds of the Senate and House of Representatives according to the rules and limitations prescribed in the case of a bill

Necessary here means necessary to give an order etc its intended effect Accordingly votes taken in either house preliminary to the final passage of legislation need not be submitted to the President nor resolutions passed by either house separately or by both houses concurrently with a view simply to expressing an opinion or to devising a common program of parliamentary action or to directing the expenditure of money appropriated to the use of the two houses Within recent years moreover the concurrent resolution has been shaped to a new and highly important use that may ultimately have great consequences It has been employed as a means of claiming for the houses the power to control or recover powers delegated by Congress to the President Thus the Reorganization Act of April 3 1939 delegated power to the President to regroup certain executive agencies and functions subject to the condition that his orders to that end might be vetoed within sixty days by a concurrent resolution Similarly the

[6] See L F Schmeckebier in 33 *American Political Science Review* 52 54 (March 1939)

[7] For further details concerning the President's veto see the present author's *The President Office and Powers* (4th Ed 1957) 277 283

Lend Lease Act of March 11 1941 the First War Powers Act of December 18 1941 the Emergency Price Control Act of January 30 1942 the Stabilization Act of October 2 1942 the War Labor Disputes Act of June 25 1943 all rendered the powers which they delegated subject to repeal sooner or later by concurrent resolution That Congress may qualify in this way its delegations of powers which it might withhold altogether would seem to be obvious [8]

Also it has been settled by practice which is generally considered albeit whitout sufficient reason to have been ratified by judicial decision that resolutions of Congress proposing amendments to the Constitution do not have to be submitted to the President [9] (*see* Article V)

SECTION VIII

The National Legislative Power

This is the most important section of the Constitution since it describes for the most part the field within which Congress may exercise its legislative power which is also the field to which the President and the National Courts are in great part confined

Congress s legislative powers may be classified as follows First its enumerated powers that is those which are defined rather specifically in ¶s 1 to17 following secondly certain other powers which also are specifically or impliedly delegated in other parts of the Constitution (*see* Section IV above also Articles II III IV and V *passim* and Amendments XIII to XX) thirdly its power conferred by

[8] On the concurrent resolution *see* the present writer s *Total War and the Constitution* 45-47 (New York 1947) Senate Report 1 335 54th Congress 2nd Session Leonard D White in 35 *American Political Science Review* 8°6 (1941) In the June 1953 issue of the *Harvard Law Review* J Jackson of the Supreme Court who was President F D Roosevelt s Attorney General at the time of the enactment of the Lend Lease Act brings to light a memorandum of the late President in which the latter contended that the provision of the Act giving the Houses of Congress the right to cancel the measure by a simple concurrent resolution rather than by a legislation subject to Presidential veto was unconstitutional notwithstanding which however he signed the bill for political reasons In the *opinion* of the present writer the late President s constitutional qualms were ill based

[9] Hollingsworth v Va 3 Dall 378 (1798) The case arose under Amendment XI after it had been approved by the required number of State legislatures In these circumstances the Court declined to interfere

¶18 below the so called coefficient clause of the Constitution to pass all laws necessary and proper to carry into execution any of the powers of the National Government or of any department or officer thereof fourthly certain inherent powers that is powers which belong to it simply because it is the national legislature the outstanding instances of which were listed earlier (*see* p 4 above)

In studying each of the first seventeen paragraphs of this section one should always bear in mind ¶18 for this clause furnishes each of the enumerated powers of Congress with its second dimension so to speak

The Taxing Power

¶1 The Congress shall have power to lay and collect taxes duties imposts and excises to pay the debts and provide for the common defense and gerneral welfare of the United States but all duties imposts and excises shall be uniform throughout the United States

Complete power of taxation is conferred upon Congress by this paragraph as well as the largest measure of discretion in the selection of purposes for which the national revenues shall be expended This complete power to lay and collect taxes is however later curtailed by the provision that no tax shall be levied on exports (*see* Section IX ¶5) Also it was ruled by the Supreme Court shortly after the Civil War that on principle Congress could not tax the instrumentalities of State government and that the salary of a State judge though in his pocket was to be regarded as such instrumentality [1] and the benefits of this doctrine were subsequently extended to the holders of State and municipal bonds [2] who were thereby exempted to the extent that their income was derived from such securities from paying income taxes to the National Government It was at first widely believed that the Sixteenth Amendment had removed the grounds of this discrimination so far as income taxes were concerned [3] but the Court eventually

The Doctrine of Tax Exemption

[1] Collector v Day 11 Wall 113 (1870)
[2] Pollock v Farmers Loan and Trust Co 157 U S 429 and 158 U S 601 (1895)
[3] *See* the evidence compiled in the present writer s Constitutional Tax

ruled otherwise[4] Indeed at one time it appeared to be bent on seeing how far it could carry the principle of exemption going to the length of holding that a manufacturer of motorcycles was not subject to the federal excise tax on sales thereof with respect to sales to a municipality[5] The Court has since abandoned this position quite completely In Graves v New York decided early in 1939 Collector v Day and New York v Graves (decided early in 1937) were pronounced over ruled so far as they recognize an implied constitutional immunity from income taxation of the sal aries of officers or employees of the national or a State government or their instrumentalities[6] and it appears highly probable that the same rule would be applied should Congress choose to invoke it to the non discriminatory taxation of income from State and municipal bonds The power of Congress however to exempt national in strumentalities from State taxation by virtue of the neces sary and proper clause still stands[7] (*see* pp 180 181) Furthermore when a State embarks upon an enterprise which if carried on by private concerns would be taxable like selling liquor or mineral waters or holding football exhibitions such activities—once but no longer termed non governmental —are subject to a non discriminatory imposition of applicable national taxes[8]

Again Congress must levy its taxes in one of two ways all duties imposts and excises must be uniform through out the United States that is the rule of liability to the tax must take no account of geography[9] while on the other hand the burden of direct taxes must be imposed upon

Exemption *Supplement to the National Municipal Review* XIII No 1 (January 1924)

[4] Brushaber v Un Pac R R Co 240 U S 1 (1916) Evans v Gore 253 U S 245 (1920)

[5] Indian Motorcycle Co v U S 283 U S 570 (1931)

[6] Graves v N Y 306 U S 466 (1939)

[7] Pittman v HOLC 308 U S 21 (1939) United States v Stewart, 311 U S 60 (1940) Indeed by a recent holding national securities are intrinsically exempt from state taxation Society for Savings v Bowers 349 U S 143 (1955)

[8] South Carolina v U S 199 U S 437 (1905) Allen v Regents 304 U S 439 (1938) New York and Saratoga Springs Com s n v U S 326 U S 572 (1946) Wilmette Park Dist v Campbell 338 U S 411 (1949)

[9] Florida v Mellon 273 U.S 12 (1927)

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[9] Florida v Mellon 273 U S 12 (1927)

the States in proportion to population (see Section II ¶3 and Section IX ¶4)

Duties are customs duties If a certain article imported from abroad is taxed five per cent at New York it must be taxed at the same rate at San Francisco etc

Excises are taxes upon the production sale or use of articles also taxes upon certain privileges and procedures of a business nature Congress has for years taxed the privilege of doing business as a corporation and the Social Security Act of 1935 levies a tax on payrolls[10]

Imposts is a general term comprehending both duties and excises

* Direct Taxes From the time of the Carriage Tax case[11] decided in 1796 to the Income Tax cases of 1895[12] the Court proceeded on the theory that the direct tax clauses should be confined to land taxes and capitation taxes and should not be extended to taxes which were not easily apportionable on the basis of population But in 1895 convinced by Mr Joseph H Choate that the country was about to go Socialistic a narrowly divided Bench one Justice—Justice Gray apparently—changing his mind at the last moment ruled that a tax on incomes derived from property was a direct tax and one therefore that must be apportioned according to population also that incomes derived from State and municipal bonds might not be taxed at all by the National Government This decision which put most of the taxable wealth of the country out of the reach of the National Government led in 1913 to the adoption of the Sixteenth Amendment

Nor has the Court since 1895 invoked its definition of direct tax except once in order to overturn a national tax measure and that was in the Stock Dividend case of 1920[13] (see p 281) At other times it has been satisfied to

[10] Flint v Stone Tracy Co 220 U S 107 (1911) Stewart Mach Co v Davis 301 U S 548 (1937)
[11] Hylton v U S 3 Dall 171 (1796)
[12] Pollock v Farmers Loan and Trust Co 157 U S 429 and 158 U S 601 (1895)
[13] Eisner v Macomber 252 U S 189 (1920) As to the present status of this decision see Helvering v Griffiths 318 U S 371 (1943)

sustain challenged taxes on historical grounds as "excises," saying in this connection that "a page of history is worth a volume of logic."[14] Today inheritance taxes are so classified, as are also estate taxes and taxes on gifts, with the result that it is sufficient if they are "uniform throughout the United States" in the geographical sense.[15]

While the raising of revenue is the primary purpose of taxation, it does not have to be its only purpose, as the history of the protective tariff suffices to demonstrate. And in the field of excise taxation, if Congress is entitled to regulate a matter, it may do so by taxing it.[16] Also, by laying down certain regulations for keeping the traffic in narcotic drugs open and above board and thereby easily taxable, Congress has in effect brought this traffic under national control.[17] Furthermore, there are some businesses which Congress may tax so heavily as to drive them out of existence, one example being the production of white sulphur matches, another the sale of oleomargarine colored to look like butter, another the dealing in sawed off shot guns.[18] On the other hand, the Court some years ago held void a special tax on the profits of concerns employing child labor, on the ground that the act was not a *bona fide* attempt to raise revenue, but represented an effort by Congress to bring within its control matters reserved to the States;[19] and later it set aside a special tax on liquor dealers conducting business in violation of State law, as being a penalty and an invasion of the police power inherent in the States.[20] That such attempts to "psychoanalyze" Congress, as the late Justice Cardozo derisively character-

Regulation by Taxation

[14] New York Trust Co. *v.* Eisner, 256 U.S. 345, 349 (1921).

[15] Ibid.; Knowlton *v.* Moore, 178 U.S. 41 (1900); Bromley *v.* McCaughn, 280 U.S. 124 (1929).

[16] Veazie Bank *v.* Fenno, 8 Wall. 533 (1869); Mulford v. Nat. Smith, 307 U.S. 38 (1939).

[17] United States v. Doremus, 249 U.S. 86 (1919); Nigro *v.* U.S., 276 U.S. 332 (1928).

[18] McCray *v.* U.S., 195 U.S. 27 (1904); Sonzinsky *v.* U.S., 300 U.S. 506 (1937); United States *v.* Sanchez, 340 U.S. 42, 44 (1950). *See also* United States *v.* Kahriger, 345 U.S. 22 (1953), in which a tax on gambling was sustained.

[19] Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

[20] United States v. Constantine, 296 U.S. 287 (1936).

ized them in the case last cited would be repeated today seems at least doubtful[21]

The Spending Power

The money which it raises by taxation Congress may expend to pay the debts and provide for the common defense and *general welfare of the United States* The important term here is general welfare of the United States Madison contended that Congress was empowered by it to tax and spend only to the extent necessary to carry into execution the *other* powers granted by the Constitution to the United States Hamilton contended that the phrase should be read literally and that the taxing spending power was *in addition* to the other powers[22] Time has vindicated Hamilton Not only has Congress from the first frequently acted on his view but the Court has gone out of its way to endorse it This occurred in the case of United States *v* Butler,[23] in which nevertheless the Court overturned the AAA on the ground that in requiring agriculturists to sign contracts agreeing to curtail production as a condition to their receiving certain payments under it the act coerced said agriculturists in an attempt to regulate a matter namely production which was reserved to the States Three Justices dissented on the ground that Congress was entitled when spending the national revenues for the general welfare to see to it that the country got its money s worth of general welfare and that the condemned contracts were necessary and proper to that end

Social Security

Later cases moreover uphold the power of the National Government to spend money in support of unemployment insurance to provide old age pensions to loan money to municipalities to enable them to erect their own electric plants and generally to subsidize by so called grants in aid all sorts of welfare programs carried on by the States[24]

[21] *See* especially Mulford *v* Nat Smith 307 U S 38 (1939) and United States *v* Darby 312 U.S 100 (1941)

[22] On the general subject *see* the present writer s article on The Spending Power of Congress 36 *Harvard Law Review* 548 582 (March 1923) *also* Charles Warren *Congress as Santa Claus* (Charlottesville Va 1932)

[23] United States *v* Butler 297 U S 1 (1936)

[24] Steward Mach Co *v* Davis 301 U.S 548 (1937) Helvering *v* Davis

The view has been advanced at times that the clause "provide for the ... general welfare of the United States" is much more than a mere grant of power to tax and spend for the general welfare and authorizes Congress to legislate generally for that purpose.[25] This view however which would render the succeeding enumeration of powers largely tautological has never so far been directly countenanced by the Court.

The Borrowing Power

¶2 To borrow money on the credit of the United States. Logically this power would seem to be limited to borrowing money to provide for the common defense and general welfare of the United States. In practice it is limited only by the credit of the United States which today appears to be without limits inasmuch as the National Debt now tops 174 billions of dollars a sum exceeding the total expenditures prior to 1940 of all governmental units in the United States. But Congress may not by any of its powers alter the terms of outstanding obligations of the United States without providing for compensation to the holders of such obligations for actual loss;[26] but this unfortunately does not signify that by pursuing inflationary fiscal policies it may not render such obligations practically worthless without being required to compensate the holders thereof for their loss which is held to be incidental or consequential merely and not a taking of property in the sense of Amendment V.[27] May Congress authorize forced loans under this clause? Not if history counts for anything. Such a loan would not be a loan at all the element of negotiation being absent from the transaction; it would be either a supplementary income tax or of it took more than income would be a capital levy which to be

301 U S 619 (1937) Albama Power Co *v* Ickes 302 U.S 364 (1938) On Federal Grants in Aid *see* pp 87 88 below

[25] 36 *Harvard Law Review*, 550-552 J F Lawson *The General Welfare Clause* (Washington 1926)

[26] Perry *v* U S 294 U S 330 (1935) *See also* Lynch *v* U S 292 U.S 571 (1934)

[27] Knox *v* Lee 12 Wall 457 (1871) Norman *v* Balt & O R R. Co 294 U S 330 (1935) *See also* Omnia Com l Co *v* U.S 261 U.S 502 (1923)

constitutional would have to be apportioned among the States

Other Fiscal Powers

The above clauses and clauses 5 and 6 following comprise what may be called the fiscal powers of the National Government By virtue of these taken along with the necessary and proper clause below Congress has the power to charter national banks to put their functions beyond the reach of the taxing power of the States to alter the metal content and value of the coinage of the United States to issue paper money and confer upon it the quality of legal tender for debts to invalidate private contracts of debt which call for payment in something other than legal tender to tax the notes of issue of State banks out of existence to confer on national banks the powers of trust companies to establish a Federal Reserve System a Farm Loan Bank etc [28] (*See also* ¶5 *of this Section*)

The Commerce Clause

¶3 To regulate commerce with foreign nations and among the several States and with the Indian tribes

Commerce is *traffic* that is the buying and selling of commodities and includes as an important incident the *transportation* of such commodities from seller to buyer But the term has also been defined much more broadly Thus in the famous case of Gibbons *v* Ogden [29] which was decided in 1824 Chief Justice Marshall said Commerce undoubtedly is traffic but it is something more—it is intercourse and on the basis of this definition the Supreme Court has held that the mere passage of people from one State to another as well as the sending of intelligence by telegraph—stock quotation for instance—from one State to another is commerce among the States Likewise radio broadcasting is commerce within this definition and hence subject to regulation by Congress as are also the activities of a holding company and its subsidiaries in con

[28] M Culloch *v* Md 4 Wheat 316 (1819) Knox *v* Lee 12 Wall 457 (1871) Veazie Bank *v* Fenno 8 Wall 533 (1869) Smith *v* Kansas City T and T Co 255 U S 180 (1921) Norman *v* Balt & O R R Co 294 U S 330 (1935) Holyoke Water Co *v* Am Writing Paper Co 300 U.S 324 (1937) Smyth *v* U.S. 302 U S 329 (1937)

[29] 9 Wheat 1 (1824)

trol and direction of gas and electric companies which are scattered through several States and make continuous use of the mails and the instrumentalities of interstate commerce, also by a recent holding transactions in insurance which involve two or more States as well as the gathering of news by a press association and its transmission to client newspapers[30]

'Among the States that is to employ Chief Justice Marshall s words that commerce which concerns more States than one and not the exclusively internal commerce of a State or to use more modern phraseology *interstate* in contrast to *intrastate* or *local* commerce[30a]

The power to regulate is the power to govern that is the power to restrain to prohibit to protect to encourage to promote in the furtherance of any public purpose whatsoever *provided* the constitutional rights of persons be not transgressed The restrictive aspects of this power have nevertheless within recent times been subject so far as *interstate* commerce is concerned to an indefinite veto power of the Court but one which appears today to be in abeyance

Commerce as Transportation

As a matter of fact until the early Thirties Congress had exercised its powers over interstate commerce for the most part only over interstate *transportation* and especially transportation by rail Since the power to regulate is the power to promote Congress may build railways and bridges or charter corporations and authorize them to build railways and bridges and it may vest such corporations with the power of eminent domain and render their franchises immune from State taxation[31] For the like rea

[30] Pensacola Tel Co v Western Un Tel Co 96 U S 1 (1877) Western Un Tel Co v Pendleton 122 U S 347 (1887) Covington Bridge Co v Ky 154 U S 204 (1894) International Text Book Co v Pigg 217 U S 91 (1910) Western Un Tel Co v Foster 247 U S 105 (1918) Federal Radio Com s n v Nelson Bros 289 U.S 266 (1933) Electric Bond and Share Co v SEC 303 U S 419 (1938) United States v South Eastern Underwriters Assoc 322 U S 533 (1944) Associated Press v U.S 326 U S 1 (1945)

[30a] *Cf* however the peculiar case of Bob-Lo Excursion Co v Michigan 333 U S 28 (1947)

[31] California v Cent Pac R R Co 127 U.S 1 (1888) Luxton v No River B. Co 153 U S 252 (1894)

son the Court in the Adamson Act case of 1916[32] recognized that Congress had very wide discretion in dealing with an emergency which threatened to stop interstate transportation When however Congress sought in 1933 to invoke the same principle in behalf of commerce in the sense of *traffic* in the enactment of the NIRA the Court declined to give any weight to the emergency justification[33] Later decisions eliminate th s difference between Congress s power over commerce in the sense of *transportation* and commerce in the sense of *traffic*

Requisites of Rate Regulation

Again Congress may regulate the rates of transportat on from one State to another or authorize its agent the Interstate Commerce Commission to do so[34] But the rates set must yield a fair return to the carrier on the value of its property the theory being that since this property is being used in the service of the public to compel its public use without just compensation would amount to confiscation[35] (*See* the private property clause of Amendment V)

But just how is such value to be ascertained? For many years two formulas competed for the Court s favor One reproduction less depreciation implied that fair value should be deemed the equivalent of what it would cost to reproduce the road at current prices minus an allowance for the road s depreciation The other the historical cost or original prudent investment formula suggested that the company was entitled to get a fair return on what it had actually put into the road in dollars and cents less again allowance for deterioration The former theory till recently favored by the Court was considerate of the casual investor s interest in an era of rising prices but by the same token supplied so shifting a basis for rate making as to be

[32] Wilson v New 243 U S 332 (1916)

[33] Schechter Bros Corp v U S 295 U S 495 (1935)

[34] For a remarkable argument against the power of Congress to regulate rates based on extreme laissez faire principles *Se* the speech of Senator William M Evarts of New York in the course of th debate on the bill to establish the Interstate Commer e Commission 18 *Cong Record* Pt I pp 603 604 (49th Cong 2nd S ss January 13 1887)

[35] Smyth v Ames 169 U S 466 (1898)

administratively impracticable[36] The latter theory escaped this disadvantage and was also a logical corollary of the legal doctrine upon which rate regulation originally rested namely that the property of a common carrier or other public utility was impressed with a public use and its business affected with a public interest *from the very outset* and that investors were forewarned of this fact Recent cases seem to indicate however that the Court is nowadays disposed to leave the whole business to the regulatory authority *provided* it affords a fair opportunity to be heard to the interests affected[37]

National Supremacy

In the Shreveport case[38] decided in 1914 the Court ruled that wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other Congress is entitled to regulate both classes of transactions In other words whenever circumstances make it necessary and proper for Congress to regulate *local* transportation in order to make its control of *interstate* transportation really effective it may do so—a principle to which the Transportation Act of 1920 gave new application and extension[39] Similarly Congress in protecting interstate telephone masseges may prohibit the disclosure of intercepted intrastate messages[40] and in sustaining the Fair Labor Standards Act of 1938[41] the Court has reached even more striking results (*See* pp 43 44 below)

Instruments and Agents of Transportation

Furthermore Congress may regulate the *instruments* and *agents* of interstate transportation and hence may pro-

[36] *See* briefs and opinions in St Louis and O Fallon R Co *v* U S 279 U S 461 (1929) and cases there cited

[37] *See* Driscoll *v* Edison Light and P Co 307 U S 104 (1939) Federal Power Com s n *v* Natural Gas Pipeline Co 315 U S 575 (1942) Federal Power Com s n *v* Hope Natural Gas Co 320 U S 591 (1944) *Colorado* Interstate Gas Co *v* FPC 324 U S 581 (1945)

[38] 234 U S 342

[39] U S Code tit 49 §13 (4) Wisconsin *v* C B & Q R R Co 257 U S 563 (1920) But a determination of the I C C *superseding a local rate set* by a State commission may be set aside by the Supreme Court as being in excess of the I C C s power under the Act of 1920 Illinois Com Com s n *v* Thomson 318 U S 675 (1943) Alabama *v* U S 325 U S 535 (1945)

[40] Weiss *v* U S 308 U S 321 (1939)

[41] U S Code tit 29 §§201 219

tect them from injury from any source whether *interstate* or *local* in character Thus, when cars engaged in local transportation are hauled as part of a train along with cars which are engaged in interstate transportation the former as well as the latter must be provided with the safety appliances which are required by the Federal Safety Appliance Act otherwise they might impede or endanger the interstate transportation [42] And it is on an extension of this principle that the Federal Employers Liability Act of 1908 rests, which modified the rules of the common law of the States for determining the liability of railways engaged in interstate commerce to those of their employees who are injured while employed in connection with such commerce [43]

When however Congress in 1934 passed an act requiring railway carriers to contribute to a pension fund for superannuated employees the Court five Justices to four held the act void both as violative of the due process clause of the Fifth Amendment and as not falling within the power to regulate interstate commerce [44] The measure Justice Roberts said had no relation to the promotion of efficiency by separating the unfit from the industry *Chief Justice Hughes* on the other hand speaking for the minority denied that Congress s power to regulate commerce and to make all laws which shall be necessary and proper to that end was limited merely to securing efficiency *The fundamental consideration which supports this type of legislation* said he is that industry should take care of its human wastage whether that is due to accident or age [45] and it followed that Congress could require interstate carriers to live up to this obligation By legislation adopted in 1935 1937 and 1938 the railroads and their employees are taxed to create a fund in the Treasury from which the employees are paid annuities pensions

[42] Southern Ry Co *v* U S 222 U S 20 (1911) For a parallel case involving bills of lading considered as instruments of interstate commerce see *United States v Ferger* 250 U S 199 (1919)

[43] U S Code tit. 45 c 2 Second Employers Liability Cases 223 U S 1 (1912)

[44] Railroad Retirement Bd *v* Alton R R Co 295 U S 330 (1935)

[45] *Ibid* p 384

death benefits and unemployment insurance in accordance with the provisions of these acts The constitutionality of these measures has not been challenged judicially[46]

Navigation and Super-Power

Navigation too is a branch of transportation and so of commerce and the power to regulate it includes the power to protect navigable streams from obstruction and to improve their navigability as by the erection of dams[47] Furthermore as was held in 1940 in the case of United States *v* Appalachian Electric Power Co this power does not stop with the needs of *navigation* but embraces also flood control watershed development and the production of electric power by the erection of dams in navigable streams Nor is the term navigable streams any longer confined by the Court as once it was to streams which are 'navigable in their natural condition but also includes under the holding just mentioned those which may be rendered navigable by reasonable improvements[48] And any electrical power developed at such a dam is property belonging to the United States (*see* Article IV Section III ¶2) in disposing of which it was held in the TVA case[49] the United States may in order to reach a distant market purchase transmission lines from a private company Indeed the Court will not intervene to prevent the Government from attempting to create a market for its electrical power by staking potential customers as by authorizing loans to municipalities to enable them to go into the business of furnishing their residents power which they would purchase from the United States[50]

Commerce as Traffic

But as was indicated above the primitive subject matter of Congress s power of regulation is *traffic* that is the purchase and sale of commodities among the States This is indicated by the etymology of the world L *cum merce* with merchandise The first important piece of legisla

[46] U S Code tit 45 §§228a 228r 261 273 351 367

[47] United States *v* Chandler Dunbar Co 229 U S 53 (1913) and cases there reviewed

[48] United States *v* Appalachian Elec P Co 311 U S 377 (1940) Oklahoma *ex rel* Phillips *v* Atkinson Co 313 U S 508 523 534 *passim* (1941) For the earlier view *cf The Daniel Ball* 10 Wall 557 (1870)

[49] Ashwander *v* TVA 297 U S 288 (1935)

[50] Alabama Power Co *v* Ickes 302 U S 464 (1938)

tion to govern interstate commerce in this sense was the Sherman Anti Trust Act of 1890[51] the opening section of which declares illegal every contract combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several States or with foreign nations The main purpose of the act was to check the development of industrial trusts but in the first important case to arise under it the Sugar Trust case of 1895[52] the Court held that its provisions could not be constitutionally applied to a combination which was admitted to manufacture ninety eight per cent of the refined sugar used in the United States inasmuch as manufacture and commerce were distinct and the control of the former belonged solely to the States Any effect of a contract with respect to manufacturing or production upon commerce among the States the Court asserted would be an indirect result however inevitable and whatever its extent and hence would be beyond the power of Congress Only the States therefore could deal with industrial monopolies

The Sherman Act and later Acts Regulating Traffic

The effect of this holding was to put the Anti Trust Act to sleep for a decade during which period most of the great industrial trusts of today got their start But in the Swift case[53] ten years later the Court largely abandoned this mode of approach for the view that where the facts show an established course of business which involves a current of commerce among the States in a certain commodity Congress is entitled to govern the local incidents of such current Thus the Anti Trust Act was formerly held to reach labor combinations interruptive of commerce among the States[54] and while the Court later largely re

[51] U S Code tit 15 c 1

[52] United States v E C Knight Co 156 U S 1 (1895) As J Harlan contended in his notable dissenting opinion the doctrine of the case simmered down to the proposition that commerce was transportation simply Actually however he pointed out both the Court and counsel recognized buying and selling or barter *as included in commerce* His conclusion was that whatever a State may do to protect its completely interior traffic or trade against unlawful restraints the general government is empowered to do for the protection of the people of all the states *Ibid* 22-42 *passim*

[53] Swift and Co v U S 196 U S 375 (1905)

[54] Bedford Cut Stone Co v Journeymen etc 274 U S 37 (1927) and cases there reviewed

tracted this construction of the act it did not do so on constitutional grounds[55] And meantime in sustaining in 1922 the Packers and Stockyards Act[56] of the previous year the Court speaking by Chief Justice Taft had asserted broadly Whatever amounts to a more or less constant practice and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congre s under the commerce clause and it is primarily for Congress to consider and decide the fact of the danger and meet it *This Court will certainly not sub*stitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effects upon it are clearly non existent [57]

To return for a moment to the Sherman Act—a decision in 1944 supported however by only a bare majority of the seven Justices participating in it holds that it applies to fire insurance transactions carried on across State lines although when the act was passed and for long afterwards it was the doctrine of the Court that the bu iness of insurance was not commerce in the sense of the Constitution[58] And recently the Act has been projected into the amusement field—to baseball to the promotion of boxing on a multiple scale coupled with sale of television broadcast and film rights to the business of booking and presenting theatrical attractions (plays musical and operettas)[59]

The New Deal Constitutional Revolution

In June 1933 Congress enacted that nine days wonder the National Industrial Recovery Act (NIRA) which among other things attempted to govern hours of labor and wages in productive industry on the theory in part

[55] *See* especially Apex Hosiery Co *v* Leader 310 U S 469 (1940) and United States *v* Hutcheson 312 U S 219 (1941)

[56] U S Code tit 7 c 9

[57] Stafford *v* Wallace 258 U S 495 at 521 (1922) The statement is repeated in Board of Trade *v* Olsen 262 U S 1 at 37 (1923) *See also* 259 U S at 408

[58] United States *v* South Eastern Underwriters Assoc 322 U S 533 (1944) The earlier cases holding the business of insurance not to be commerce are reviewed in J Black s opinion They are headed by Paul *v* Va 8 Wall 168 (1868)

[59] Radovich *v* National Baseball League —U S —(1957) United States *v* Boxing Club of New York 348 U S 236 (1955) United States *v* Shubert 348 U S 222 (1955)

that in the circumstances of the then existing emergency they affected commerce among the States The act however was set aside by the Court in the Poultry (Sick Chicken) case largely on the basis of the doctrine of the old Sugar Trust case and in the spring of 1936 the same doctrine was reiterated by the Court in setting aside the Guffey Coal Conservation Act of 1935 although the trial court had found that as a matter of fact interstate commerce in soft coal had been repeatedly interrupted for long periods by disputes between owners and workers on questions of hours of labor and of wages [60]

This extremely artificial view of the subject has since been abandoned In the Jones Laughlin case and attendant cases [61] decided on April 12 1937 a five-to four Court speaking by Chief Justice Hughes declined longer to deal with the question of direct and indirect effects in an intellectual vacuum and held that the question whether incidents of the employer employee relationship in productive industries affected interstate commerce was one of fact and degree and on this ground held that the Wagner Labor Relations Act of 1935 which requires employers to permit their employees freely to organize and to bargain with them collectively was constitutionally applicable to certain manufacturing companies seeking an interstate market for their products But the doctrine of the case applies also to natural products to coal mined to stone quarried to fruit and vegetables grown [62] nor is it restricted by the smallness of the volume of the commerce affected in any particular case [63]

Also Congress—subject no doubt to the due process clause of Amendment V—may regulate the prices of commodities sold in interstate commerce and even the local prices of commodities which affect the interstate prices thereof [64] Indeed the power to regulate rates of transporta

[60] Schechter Bros v U S 295 U S 495 (1935) Carter v Carter Coal Co 298 U S 238 (1936)

[61] National Labor Relations Bd v Jones & L. Steel Corp 301 U S 1 (1937)

[62] Santa Cruz Fruit Packing Co v NLRB 303 U S 453 (1938)

[63] National Labor Relations Bd v Fainblatt 306 U S 601 (1939)

[64] United States v Rock Royal Coop 307 U S 533 (1939)

or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power for the benefit of the public within the field of interstate commerce.[69] And proceeding on this basis Congress has prohibited the knowing transportation of lottery tickets from one State to another, of impure or falsely branded foods, of filled milk, of women for immoral purposes, of liquor, of stolen automobiles, of stolen goods in general; while by the so-called "Lindbergh Law" of 1932 it has made kidnaping when the victim is taken across State lines a crime against United States; and all these measures have been duly sustained by the Court, or their validity has not been challenged before it.[69]

Cooperative Federalism

Nevertheless, when in 1916 Congress endeavored to break up a widespread traffic in child made goods by forbidding the transportation of such goods outside the State where produced, it was informed in the case of Hammer *v.* Dagenhart[70] by a closely divided Court that it was not regulating commerce among the States but was invading "the reserved powers of the States," *meaning thereby the* power of the States over the employer-employee relationship in productive industry. But as Justice Holmes pointed out in his celebrated dissenting opinion, while a State is free to permit production for its own local market to take place under any conditions whatever so far as national power is concerned, when it seeks a market outside its boundaries for its products it is no longer within its rights but "enters a field where before the Constitution was adopted it could have been met by the prohibitions of sister States and where under the Constitution Congress is entitled to govern."[70a] What is more, as the decisions stood at that date *both* Congress and the States were forbidden to prohibit the free flow of the products of child labor from one State to another—the former on the ground that

[68] Brooks *v.* U.S., 267 U.S. 432, 436 (1925).

[69] U.S. Code, tit. 18, c. 9; Champion *v.* Ames, 188 U.S. 321 (1903); Hipolite Egg Co. *v.* U.S., 220 U.S. 45 (1911); Hoke *v.* U.S., 227 U.S. 308 (1913); Clark Distilling Co. *v.* W. Md. Ry., 242 U.S. 311 (1917); Brooks *v.* U.S., 267 U.S. 432 (1925); Gooch *v.* U.S., 297 U.S. 124 (1936); United States *v.* Carolene Products Co., 304 U.S. 104 (1938).

[70] 247 U.S. 251 (1918).

[70a] *Ibid.*, 277, 281.

it would be usurping power reserved to the States the latter on the ground that they would be usurping Congress's power to regulate commerce![71]

The "New Deal Constitutional Revolution" completed

Today this gap in governmental authority in this country appears to have been closed In the notable case of United States v Darby[72] the Court gave a clean bill of health to the Fair Labor Standards Act of 1938 which not only prohibits interstate transportation of goods produced by labor whose hours of work and wages do not conform to the standards imposed under the act but even interdicts the production of such goods for commerce The decision which explicitly overrules Hammer v Dagenhart invokes both the commerce clause and the necessary and proper clause Subsequently the Court has held that the caretakers of a 22 story building in New York City were covered by the act heat being essential to warm the fingers of the seamstresses employed by a clothing manufacturer who rented space in the building and who sold goods across State lines[73] likewise the maintenance employees of the central office building of a manufacturing corporation engaging in interstate commerce in a product coming from plants located elsewhere[74] also the employees of a window cleaning company the greater part of whose work was done on the windows of industrial plants producing goods for interstate commerce[75] etc etc In the second of the above cases Chief Justice Stone and Justice Roberts protested albeit unavailingly against the house that Jack built chain of causation whereby the sweep of the statute was extended to the ultimate *causa causarum* which result in the production of goods for commerce[76] Quite justifiably Justice Roberts remarks in his Holmes Lectures for 1951 that the Fair Labor Standards Act today places the whole matter of wages and hours of persons employed in the

[71] See the present writer's *The Twilight of the Supreme Court* 26-37 (New Haven 1934)

[72] 312 U S 100 (1941) [73] Kirschbaum v Walling 316 U S 517 (1942)

[74] Borden Co v Borella 325 U S 679 (1945)

[75] Martino v Mich Window Cleaning Co 327 U S 173 (1946) See also *Constitution of the United States of America Annotated* 157 159 (Government Printing Office 1953)

[76] 325 U S 679 685

United States with slight exceptions under a single federal regulatory scheme and in this way supersedes state exercise of the police power in this field [77]

And in Wickard v Filburn decided some months after the Darby Case a still deeper penetration by Congress into the field of production was sustained As amended by the act of 1941 the Agricultural Adjustment Act of 1938 [78] regulates production even when not intended for commerce but wholly for consumption on the producer s farm Sustaining this extension of the act the Court pointed out that the effect of the statute was to support the market It said It can hardly be denied that a factor of such volume and variability as home consumed wheat would have a substantial influence on price and market conditions This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases But if we assume that it is never marketed it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market Home grown wheat in this sense competes with wheat in commerce The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices And it elsewhere stated Questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as production and indirect and foreclose consideration of the actual effects of the activity in question upon interstate commerce The Court s recognition of the relevance of the economic effects in the application of the Commerce Clause has made the me

[77] Owen J Roberts *The Court and the Constitution* 56 (Harvard University Press 1951)

[78] 52 Stat 31

chanical application of legal formulas no longer feasible [9]

It was also in reliance on its power to prohibit interstate commerce and to exert like power over the mails that Con gress enacted the Securities Exchange Act of 1934 and the Public Utility Holding Company Act (Wheeler Rayburn Act) of 1935 [80] The former authorizes the Securities and Exchange Commission which it creates to lay down regula tions designed to keep dealing in securities honest and above board and closes the channels of interstate commerce and the mails to dealers refusing to register under the act The latter requires by sections (a) and 5 the companies which are governed by it to register with the Secur tes and Exchange Commission and to inform it concernig their business organization and financial structure all on pain of being prohibited use of the facilities of interstate commerce and the mails while by section 11 the so called death sentence clause the same act closed after a certain date the channels of interstate communication to certain types of public utility companies whose operations Congress found were calculated chiefly to exploit the investing and consuming public All of the above provisions have been sustained [81]

The Commerce Clause as a Restraint on the States

The commerce clause comprises however not only the direct source of the most important peace time powers of the National Government it is also except for the due process of law clause of Amendment XIV the most important basis for judicial review in limitation of State pow er The latter or restrictive operation of the clause was in fact long the more important one from the point of view of Constitutional Law Of the approximately 1400 case which reached the Supreme Court under the clau e prior to 1900 the overwhelming proportion setemmed from State legislation [82] It resulted that except for the great

[9] Wickard v Filburn 317 U S 111 128 129 (1942) It should be noted that by the logic of this holding Congress could govern the production of goods for the local market inasmuch as they would overhang the inter state market

[80] U S Code tit 15 §§77a 77aa 79 *ff*

[81] Electric Bond and Share Co v S E C 303 U S 419 (1938) North American Co v S E C 327 U S 686 (1946) American Power and Light Co 329 U S 90 (1949)

[82] Prentice and Egan *The Commerce Clause of the Federal Constitu*

case of Gibbons v Ogden which was dealt with above the guiding lines in construction of the clause were initially laid down by the Court from the point of view of its operation as a curb on State power rather than of its operation as a source of national power and the consequence of this was that the word commerce as designating the thing to be protected against State interference long came to dominate the clause while the potential word regulate remained in the background The correction of this bias is the very essence of the Constitutional Revolution which culminated in United States v Darby

Unquestionably one of the great advantages anticipated from the grant to Congress of power over commerce was that State interferences with trade which had become a source of sharp discontent under the Articles of Confederation would be thereby brought to an end As Webster stated in his argument for appellant in Gibbons v Ogden The prevailing motive was to regulate commerce to rescue it from the embarrassing and destructive consequences resulting from the legislation of so many different States and to place it under the protection of a uniform law In other words the constitutional grant was itself a regulation of commerce in the interest of uniformity Justice Johnson s testimony in his concurring opinion in the same case is to like effect There was not a State in the Union in which there did not at that time exist a variety of commercial regulations By common consent those laws dropped lifeless from their statute books for want of sustaining power that had been relinquished to Congress [83] and Madison s assertion late in life that power had been granted Congress over interstate commerce mainly as a negative and preventive provision against injustice among the States [84] carries a like implication

State Taxation Affecting Commerce

The first case in which the clause was treated by the Court as a *limitation* on State power was *Brown v Mary-*

tion 14 (1898) The balance began to be adjusted with the enactment of the Interstate Commerce Act in 1887

[83] Wheat 1 11 226 (1824)

[84] 4 Madison *Letters and Other Writings* 14 15 (Philadelphia 1865)

land[8] decided in 1827 Here Marshall laid down the double rule that a State may not tax goods imported from abroad so long as they remained in the original package in the hands of the importer and that the right to import includes the right to sell This doctrine still remains the law on the subject a unique instance of longevity in this general field which may be described as a graveyard of discarded concepts

The Court s Problem Today

But foreign commerce is one thing interstate commerce a quite different thing The letter is conducted in the interior of the country by persons and corporations that are ordinarily engaged also in local business its usual incidents are acts which if unconnected with commerce among the States would fall within the State s powers of police and taxation while the things it deals in and the instruments by which it is carried on comprise the most ordinary subject matter of State power In this field the court has consequently been unable to rely upon sweeping solutions To the contrary its judgments have often been fluctuating and tentative even contradictory and this is particularly the case as respects the infringment of the State taxing power on interstate commerce In the words of Justice Frankfurter The power of the State to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long continuous process of judicial adjustment The need for such adjustment is inherent in a Federal Government like ours where the same transaction has aspects that may concern the interests and involve the authority of both the central government and the constituent States The history of this problem is spread over hundreds of volumes of our Reports To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts [8a]

[8] 12 Wheat 419 (1827) The benefits of this holding were extended as recently as 1945 to certain imports from the Philippine Islands Hoover and Allison Co v Evatt 324 U S 652

[8a] Freeman v Hewit 329 U S 249 251 (1946)

The Police Power vis a vis Commerce

But while Justice Frankfurter was speaking primarily with the State s taxing power in mind his words apply also to the Court s work in endeavoring to draw the line between the commercial interest and the State s police power In this field the great leading case prior to the Civil War one which is still invoked by the Court on occasion was Cooley *v* Board of Wardens of the Port of Philadelphia [87] decided in 1851 The question at issue was the validity of a Pennsylvania pilotage act so far as it applied to vessels engaged in foreign commerce and the coastwise trade The Court speaking through Justice Curtis sustained the act on the basis of a distinction which was earlier advanced by Webster in Gibbons *v* Ogden between those subjects of commerce which imperatively demand a single uniform rule operating throughout the country and those which as imperatively demand that diversity which alone can meet the local necessities of navigaton that is to say of commerce As to the former the Court held Congress s power to be exclusive as to the latter it held that the States enjoyed a power of concurrent legislation

Following the Civil War however other formulas emerged from the judicial smithy several of which are brought together into something like a doctrinal system in Justice Hughes comprehensive opinion for the Court in the Minnesota Rate Cases [88] decided in 1913 Direct regulation of foreign or interstate commerce by a State is here held to be out of the question At the same time the States have their police and taxing powers and may use them as their own views of sound public policy may dictate even though interstate commerce may be inci

[87] 12 How 299 (1851) The doctrine laid down in Cooley *v* Port Wardens seems to have become obsolete except perhaps with respect to bridges dams and ferries established under State authorization in or over naviga ble streams *See* Escanaba Co *v* Chicago 107 U S 678 (1822) Port Rich mond etc Co *v* Board of Chosen Freeholders 234 U S 317 (1914) *Cf* however with the above C J Stone s opinion for the Court in California *v* Thompson 313 U S 109 (1941) where the Cooley case is made the ful crum for a decision overturning DiSanto *v* Pa 273 U S 34 (1927) Both cases involved the power of a State to apply a license statute regulating transportatation agents to one negotiating for the transporation of persons to points outside the State

[88] Simpson *v* Shepard 230 U.S 352 402 (1913)

dentally or indirectly regulated it being understood that such incidental or indirect effects are always subject to Congressional disallowance Our system of government Justice Hughes reflects is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency

The Court's Arbitral Role

In more concrete terms the varied formulas which characterize this branch of our Constitutional Law have been devised by the Court from time to time in an endeavour to effect a practical adjustment between two great interests the maintenance of freedom of commerce except so far as Congress may choose to restrain it and the maintenance in the States of efficient local governments Thus while formulas may serve to steady and guide its judgment the Court's real function in this area of judicial review is essentially that an arbitral or quasi legislative body So much so is this the case that in 1940 three Justices joined in an opinion in which they urged that the business of drawing the line between the immunity of interstate commerce and the taxing power of the States should be left to the legislatures of the States and to Congress with the final remedy in the hands of the latter[89] But if the taxing power then why not the police power too ? The idea was preposterous inasmuch as any *general* act covering the subject would have had to be couched in such loose terms that the original difficulty demanding judicial explication and solution would have remained The suggestion has apparently been abandoned by its authors

The following situations and the results reached by the

[89] McCarrol *v* Dixie Greyhound Lines 309 U S 176 188 189 (1940) F D G Ribble's *State and National Power Over Commerce* (Columbia University Press 1937) is an excellent study both of the Court's formulas and of the arbitral character of its task in this field of Constitutional Law On the latter point *see especially* Chs X and XII The late Chief Justice Stone took repeated occasion to stress the balancing and adjusting role of the Court when applying the commerce clause in relation to State power *See* his words in South Carolina State Highway Dept *v* Barnwell Bros 303 U S 177 184 192 (1938) California *v* Thompson 313 U S 109 113 116 (1941) Parker *v* Brown 317 U S 341 362-363 (1943) and Southern Pacific *v* Ariz 325 U.S 761 766-770 (1945) *See also* Justice Black for the Court in United States *v* South Eastern Underwriters Assoc 322 U S 533 548 549 (1944)

Holdings in re State Taxation Affecting Commerce

Court in treating them are illustrative of its work in the field of State taxation affecting interstate commerce. While the original package doctrine does not protect goods imported from sister States from non-discriminatory taxation,[90] goods in transit from one State to another are removed from the taxable wealth of the State of origin from the beginning of their journey[91] and are not taxable by the State of destination until they have come to rest there for final sale or disposal.[92] Local sales of goods brought from another State are, however, subject to non-discriminatory taxation,[93] but the negotiation of sales to be filled by importations from another State is interstate commerce and so may not be taxed. This doctrine, which was first laid down in 1887 in the famous case of Robbins v. Shelby Taxing District,[94] was formerly extended to cover deliveries of goods attended by many local incidents,[95] but in recent years, due primarily to the late Depression, this attitude of concession to the commercial interest has been considerably curtailed. Thus it was held early in 1937 that States which have sales taxes—at that time the principal defence against bankruptcy in many States—might levy compensating taxes upon the use within their territory of articles brought in from other States.[96] A sale of goods intended for shipment to another State may not be taxed.[97]

[90] Woodruff v. Parham, 8 Wall. 133 (1868); Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923); Ingels v. Morf, 300 U.S. 290 (1937).

[91] State Freight Tax Case, 15 Wall. 232 (1873); Coe v. Errol, 116 U.S. 517 (1886).

[92] Brown v. Houston, 114 U.S. 622 (1885).

[93] Emert v. Mo., 156 U.S. 296 (1895); Wagner v. Covington, 251 U.S. 95 (1919); Eastern Air Transport Inc. v. S.C. Tax Com'sn, 285 U.S. 147 (1932). *Cf.* Welton v. Mo., 91 U.S. 275 (1875), where a tax discriminating against goods from other States was overturned.

[94] 120 U.S. 489 (1887).

[95] *See* Caldwell v. N.C., 187 U.S. 622 (1903); Norfolk W. R. Co. v. Sims, 191 U.S. 441 (1903); Rearick v. Pa., 203 U.S. 507 (1906); Dozier v. Ala., 218 U.S. 124 (1910).

[96] Henneford v. Silas Mason Co., 300 U.S. 577 (1937). On the other hand more recent cases appear to represent a retreat from the doctrines of the Depression cases. *Cf. e.g.* Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1940), and McGoldrick v. Berwind White Co., 309 U.S. 33 (1940), *with* Best and Co. v. Maxwell, 311 U.S. 454 (1940); McLeod v. Dilworth Co., 322 U.S. 327 (1944), and Nippert v. City of Richmond, 327 U.S. 416 (1946).

[97] Dahnke Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921). *Cf.* however Minnesota v. Blasius, 290 U.S. 1 (1933).

of its town[105] In 1938 Justice Stone speaking for the Court advanced what has been called the multiple taxation test The question it poses is what would happen to the interstate commerce affected by it if everybody—that is every state which the commerce touches —did the same ?[106] Some of the Justices hastily concluded that the new rubric might safely replace the apportionment rule with all its difficulties and uncertainties but more recent holdings seem to dash this hope[107]

Problems Posed by the Motor Vehicle and Airplane

The advent of the motor vehicle and of the airplane each in turn confronted the Court with the new problem As to the former it would seem that any tax the proceeds of which are designated as being for highway improvement is sure of the Court s blessing so long as it does not discriminate against out of-state vehicles[108] The fate of the airplane on the other hand is still in the lap of the gods Thus when Minnesota sought in 1944 to justify the imposition of its personal property tax on the entire air fleet owned by a Minnesota company but operated by it in interstate commerce although the tax itself was sustained by a narrow majority no formula commanded the assent of more than four of the Justices[109] The status of air transport in this field still remains to be clarified

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be sustained In other words the Court s function in the handling of this type of case is even more emphatically than in the taxation field that of an arbitral rather than of a strictly judicial body Thus in 1943 it held that a State is entitled to authorize in the interest of maintaining producers prices a scheme imposing restrictions on the sale within the State of a crop ninety five percent of which eventually enters interstate and foreign commerce there being no act of Congress with which the State act was found to conflict [110] But this holding does not necessarily disturb an earlier one that a State has no right to promote its own economic welfare at the expense of the rest of the country by prohibiting the entrance within its borders or the exit from them of legitimate articles of commerce the Constitution having been framed upon the theory that the people of the several States must sink or swim together and that in the long run prosperity and salvation are in union and not division [111]

Holdings in re the Police Power"

Similarly a State may require all engineers operating within its borders even those driving through trains to be tested for color blindness but it may not limit the length of trains nor apply a Jim Crow law to interstate bus passengers [112] Nor may a State regulate rates of transportation in the case of goods being brought from or carried to points outside the State and while it may regulate rates for goods bound simply from one point to another within its own borders yet even such rates are subject to be set aside by national authority if they discriminate against or burden interstate commerce [113]

Nor is the Court s *quasi* arbitral function confined to

[110] Parker v Brown 317 U.S 341 (1943)

[111] Baldwin v Seelig 294 U.S 511 523 (1935)

[112] Smith v Ala. 124 U.S 465 (1888) Southern Pacific Co v Ariz. 325 U S 761 (1945) Morgan v Va 328 U.S 373 (1946) The survey of such cases in Justice Hughes opinion for the Court in the Minnesota Rate Cases 230 U.S at pp 402-412 (1913) and that by C.J Stone in the last cited Arizona case are very informative The latter opinion is also a model of hard hitting factual criticism

[113] Wabash Ry Co v Ill 118 U.S 557 (1886) the Shreveport Case 234 U S 342 (1914) State imposed rates no less than nationally imposed rates must yield the carrier a fair return on the "value" of its property Smyth v Ames 169 U S 466 (1898)

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But as was said before the States have also their so called police power' that is the power to promote the health safety morals and general welfare Laws passed in exercise of this power may often affect commerce incidently but if the resultant burden is found by the Court to be on the whole justified by the local interest involved such laws will

[105] Maine v Grand Trunk R Co 142 U S 217 (1891) was the leading case Cf Galveston Harrisburg & San Antonio R Co v Tex 210 U S 217 (1908) See also International Pipe Line Co v Stone 337 U S 662 (1949) for an extensive review of the cases

[106] Western Live Stock v Bureau of Revenue 303 U S 250 255 256 (1938)

[107] See Joseph v Carter and Weekes Stevedoring Co 330 U S 422 433 (1947)

[108] See Interstate Transit v Lindsey 283 U S 183 (1931) Aero May flower Transit Co v Board of R R Com rs 332 U S 495 503 504 (1947) and Bode Barrett 344 U S (1953) upholding a tax on motor vehicles according to gross weight See also Capital Greyhound Lines v Brice 339 U S 542 561 (1950)

[109] Northwest Airlines v Minn 322 U S 292 (1944)

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the question whether State legislation has unconstitutionally invaded the field of power which the commerce clause is thought to reserve to Congress exclusively It is also brought into requisition and with the extension of national power into the industrial field more and more so when in determining whether certain State legislation conflicts with a certain act or acts of Congress If such is the case then of course the State legislation must be treated as void so long as the conflicting national legislation remains on the statute book *provided* it is constitutional and the Court will not ordinarily be keen to discover such a conflict[114] When nevertheless Congress speaks unmistakably its legislation protection of interstate commerce will be enforced Thus in a recent case the Court sustained the Federal Motor Carriers Act (49 USC §§ 301 *et seq*) which forbids a state to suspend the right of an interstate carrier to use the state s highways for interstate goods because of repeated violation of certain state regulations The state s remedy the Court said lay in an appeal to the Interstate Commerce Commission[114a]

National and State Laws Overlap

Nor in fact does Congress always *subtract* from the powers of the States affecting commerce – sometimes it *adds* to them Thus the serious confusion that would otherwise have resulted from the Court s decision in 1944 in the South Eastern Underwriters case (*see* p 39) was obviated by the passage early in 1945 of the McCarran Act which provides that the insurance business shall continue to be subject to the laws of the several States except as Congress may specifically decree otherwise[115] and years ago Congress by the Webb Kenyon Act of 1916 subjected interstate shipments of intoxicants to regulation by the State of destination thereby in effect delegating power over such interstate commerce to the States And in both these instances Congress was sustained by the Court[116]

[114] Parker v Brown 317 U S 341 at p 351 *See also* Allen Bradley Local No 1111 *et al* v Wisconsin Employment Rels Bd 315 U S 740 (1942) Penn Dairies v Milk Control Com s n 318 U S 261 (1943) Hill v Fla 325 U S 538 (1945) *

[114a] Castle v Hayes Freight Lines Inc 348 U S 61 (1954)

[115] 79th Congress 1st Session Public Law 15 approved March 9 1945

[116] *See* Prudential Ins Co v Benjamin 328 U S 408 (1946) and Clark

¶4 To establish an uniform rule of naturalization and uni form laws on the subject of bankruptcies throughout the United States

There seems to be no good reason why two such entirely different subjects should be dealt with in the same clause further than that legislation regarding each has to be uni form

Naturalization and Citizenship

Some are born citizens some achieve citizenship some have citizenship thrust upon them The first category falls into two groups First those who are born in the United States, subject to the jurisdiction thereof are pronounced citizens of the United States and of the State wherein they reside by the opening clause of Amendment XIV which derives from the principle of *jus soli* (the law of the soil) of the English common law and further back still from the feudal law As rather improvidently inter preted by the Court in the Wong Kim Ark case[117] this clau e endows with Amercian citizenship even the children of temporary residents in the United States provided they do not have diplomatic status The second group of citi zens at birth owe their citizenship to Congressional legis lation which applies the *jus sanguinis* (the law of blood relationship) of the Roman civil law and embraces with certain qualifications persons born outside the United States and its outlying possession to parents one or both of whom a e citizens of the United States[118]

Those who achieve citizenship are persons who were born aliens but who have become naturalized in con formance with the laws of Congress Formerly this privilege was confined to white persons and persons of African na

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Distilling Co v W Md Ry 242 U S 311 (1917) The Supreme Court has never forgotten the lesson which was administered it by the act of Con gress of August 31 1852 which pronounced the Wheeling Bridge a law ful structure thereby setting aside the Court s determination to the con trary earlier the same year *See* Pennsylvania v Wheeling and Belmont Bridge 13 How 518 (1852) 18 How 421 (1856) This lesson stated in the Court s own languag thirty year s later was It is Congress and not the Judicial Department to which the Constitution has given the power to regulate commerce Transportation Co v Parkersburg 107 U S 691 701 (1883)

[117] United States v Wong Kim Ark 169 U S 649 (1898)

[118] U S Code tit 8 §601 Act of June 27 1952 66 Stat 163 tit 3§301

tivity or descent but was extended by the Act of December 17 1943 to decendants of races indigenous to the Western Hemisphere and Chinese persons or persons of Chinese descent [119] But naturalization is by no means a favor for the asking by those who are racially qualified under the Nationality Act of October 14 1940 which for the most part merely codifies earlier statutes, no person may be naturalized who advocates or belongs to a group which advocates opposition to all organized government or who believes in or belongs to a group which believes in the overthrow by force or violence of the Government of the United States or of all forms of law and any person petitioning for naturalization must before being admitted to citizenship take an oath in open court to *renounce and abjure absolutely all allegiance and fidelity* to any foreign prince or state of whom or which the petitioner was before a subject or citizen to support and defend the Constitution and laws of the United States against all enemies foreign and domestic and to bear full faith and allegiance to the same provisions which prior to April 22 1946 required him to be ready and willing to bear arms for the United States but do so no longer [120] And any naturalized person who takes this oath with mental reservations or conceals beliefs and affiliations which under the statute disqualify one for naturalization is subject upon these facts being conclusively shown in a proper proceeding to have his certificate of naturalization cancelled for fraud [121] In all other respects however the

Some Acts of Congress

[119] U S Code tit 8 §703 66 Stat tit 3 §311

[120] U S Code tit 8 §§705 and 735 United States v Schwimmer 279 U S 644 (1929) United States v Macintosh 283 U S 605 (1931) Girouard v U S 328 U S 61 (1946) The above restrictive provisions are moreover by the Act of June 27 1952 applicable to any applicant for naturalization who at any time within a period of ten years immediately preceding the filling of the petition for naturalization or after such filling and before taking the final oath of citizenship is or has been found to be *within any of the classes enumerated within this section notwithstanding* that at the time the petition is filed he may not be included within such classes 66 Stat 163 tit 3 §313 (C)

[121] *U S Code tit 8 §738 Johannessen v U S* 225 U S 227 (1912) In both Schneiderman v U S 320 U S 118 (1943) and Baumgartner v U S 322 U S 665 (1944) dis ri t court decisions ord ring cancellation were reversed on the ground that the government had not discharged the burden of proof resting upon it The decision in the Schneiderman case went to the verge of nullifying the cancellation provision but in Knauer

naturalized citizen stands under the Constitution on an equal footing with the native citizen save as regards eligibility to the Presidency[12] He enjoys therefore the same freedom of speech and publication the same right to criticize public men and measures whether informedly or foolishly the same right to assemble to petition the government in short the same civil rights as do citizens from birth

Illustrative of persons who have had citizenship thrust upon them are members of an Indian or other aboriginal tribe who by the Act of 1887 and succeeding legislation are declared to be citizens of the United States if they were born within the United States[13] and by the Act of June 27 1952 certain categories of persons born in the Canal Zone Panama Puerto Rico Alaska Hawaii the Virgin Islands and Guam on or after certain stated dates[124]

Congress's Inherent Power over Citizenship and Expatriation

The interesting question arises whether Congress when it extends American citizenship to certain categories at birth does so by virtue of the constitutional clause here under discussion or by virtue of an inherent power ascribable to it in its quality as the national legislature While the point has never been adjudicated the dictionary definition of naturalize *to adopt as a foreigner into a nation or state*[15] tends to confirm the latter theory as does also the fact that in the pioneer Act of 1855 dealing with the matter Congress declared children born abroad of American citizens to be citizens Even more clearly does Congress's power to deal with the subject of expatriation seem to require some such explanation At the common law the *jus soli* was accompanied by the principle of indelible allegiance out of which stemmed for instance Great Britain s claim of right in early days to impress naturalized American seamen of British birth and even

v U S 328 U S 654 (1946) some of the lost ground is recovered and by the Act of June 27 1952 probably all of it is

[12] The cases just cited O born v Bk of U S 9 Wheat 738 at 827 (1824) Luria v U S 231 U S 9 (1913)

[123] U S Code tit 8 §§601 602

[124] 66 Stat tit 3 §§302 307 *See also* on Collective Naturalization Boyd v Neb 143 U S 135 162 (189_)

[15] *See also* Chief Justice Taney s dictum in the Dred Scott case that the naturalization clause applies only to persons born in a foreign country under a foreign government 19 How 393 417 419 (1857)

as far down as 1868 American courts often implicitly accepted this principle Our Secretaries of State on the other hand usually asserted the doctrine of expatriation in their negotiations with other governments respecting the rights abroad of American citizens by naturalization and on July 27 1868 Congress passed a resolution declaring the latter doctrine to be a fundamental principle of this Government one not to be questioned by any of its officers in any of their opinions orders decisions etc [116] Then by an act passed in 1907 although since repealed in this respect Congress enacted that any woman marrying a foreigner should take the nationality of her husband To the contention that this provision deprived American citizens of their constitutional right to that status the Court replied that the maintenance of the ancient principle of the identity of husband and wife was a reasonable requirement of international policy a field in which the National Government was invested with all the attributes of sovereignty While Congress said the Court may not arbitrarily impose a renunciation of citizenship yet marriage with a foreigner was tantamount to voluntary expatriation [117] And for like reasons Congress may provide that naturalized citizens shall lose their acquired status under certain conditions by protracted residence abroad although their minor children born in the United States not sharing the parent s intention in the eyes of the law do not share his fate [118] And in the light of these precedents legislative and judicial it would seem to be within Congress s power whenever the public safety might be reasonably deemed to require it to enact that American citizens of dual nationality take an oath of fealty to the United States repudiating all claims of any other government upon their allegiance on pain of otherwise being considered to have expatriated themselves [119]

[116] R S §§ 1999 2000 *and see* generally 3 Moore *Digest of International Law* (Washington 1906)

[117] Mackenzie *v* Hare 239 U S at pp 311 312 (1915) *cf* United States *v* Wong Kim Ark 169 U S at p 703 (1898)

[118] Perkins *v* Elg 307 U S 325 (1939)

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Merging with its delegated power over the subject of naturalization is the inherent power of Congress to exclude aliens from the United States This is absolute In the words of the Court That the government of the United States through the action of the legislative department can exclude aliens from its territory is a proposition which we do not think open to controversy Jurisdiction over its own territory to that extent is an incident of every independent nation It is a part of independence If it could not exclude aliens it would be to that extent subject to the control of another power The United States in their relation to foreign countries and their subjects or citizens are one nation invested with powers which belong to independent nations the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory [130] By the Immigration and Nationality Act of June 27 1952 some thirty-one categories of aliens are excluded from the United States including aliens who are or at any time have been members of or affiliated with any organization that advocates or teachers the overthrow by force violence or other unconstitutional means of the Government of the United States [131]

Congress s Inherent Power to Exclude Aliens

With the power of exclusion goes moreover the power to assert a considerable degree of control over aliens after

United States *see* 66 Stat 163 tit 3 §§ 349 357 Congress s power over naturalization is an exclusive power A State cannot denationalize a foreign subject who has not complied with federal naturalization law and constitute him a citizen of the United States or of the State so as to deprive the federal courts of jurisdiction over a controversy between him and a citizen of a State Chirac *v* Chirac 2 Wheat 259 269 (1817) But power to naturalize aliens may be and early was devolved by Congress upon state courts having a common law jurisdiction Holmgren *v* U S 217 U S 509 (1910) where it is also held that Congress may provide for the punishment of the false swearing in such proceedings *Ibid* 520 Also States may confer the right of suffrage upon resident aliens who have declared their intention to become citizens and have frequently done so Spragius *v* Houghton 3 Ill 377 (1840) Stewart *v* Foster 2 Binney (Pa) 110 (1809)

[130] Chinese Exclusion Case 130 U S 581 603 604 (1889) *see also* Fong Yue Ting *v* U S 149 U S 698 705 (1893) Japanese Immigrant Case 189 U S 86 (1903) Turner *v* Williams 194 U S 279 (1904) Bugajewitz *v* Adams 228 U S 585 (1913) Hines *v* Davidowitz 312 U S 52 (1941)

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[130] Chinese Exclusion Case 130 U.S 581 603 604 (1889) *see also* Fong Yue Ting *v* U S 149 U S 698 705 (1893) Japanese Immigrant Case 189 U S 86 (1903) Turner *v* Williams 194 U S 279 (1904) Bugajewitz *v* Adams 228 U S 585 (1913) Hines *v* Davidowitz, 312 U S 52 (1941)

[131] 66 Stat 163 tit 2 §212

as far down as 1868 American courts often implicitly accepted this principle Our Secretaries of State on the other hand usually asserted the doctrine of expatriation in their negotiations with other governments respecting the rights abroad of American citizens by naturalization and on July 27 1868 Congress passed a resolution declaring the latter doctrine to be a fundamental principle of this Government one not to be questioned by any of its officers in any of their opinions orders decisions etc [16] Then by an act passed in 1907 although since repealed in this respect Congress enacted that any woman marrying a foreigner should take the nationality of her husband To the contention that this provision deprived American citizens of their constitutional right to that status the Court replied that the maintenance of the ancient principle of the identity of husband and wife was a reasonable requirement of international policy a field in which the National Government was invested with all the attributes of sovereignty While Congress said the Court may not arbitrarily impose a renunciation of citizenship yet marriage with a foreigner was tantamount to voluntary expatriation [17] And for like reasons Congress may provide that naturalized citizens shall lose their acquired status under certain conditions by protracted residence abroad although their minor children born in the United States not sharing the parent s intention in the eyes of the law do not share his fate [18] And in the light of these precedents legislative and judicial it would seem to be within Congress s power whenever the public safety might be reasonably deemed to require it to enact that American citizens of dual nationality take an oath of fealty to the United States repudiating all claims of any other government upon their allegiance on pain of otherwise being considered to have expatriated themselves [19]

[16] R S §§ 1999 2000 *and see generally* 3 Moore *Digest of International Law* (Washington 1906)

[17] Mackenzie v Hare 239 U S at pp 311 312 (1915) *cf* United States v Wong Kim Ark 169 U S at p 703 (1898)

[18] Perkins v Elg 307 U S 325 (1939)

[19] For acts which today constitute a renunciation of citizenship of the

Congress's Inherent Power to Exclude Aliens

Merging with its delegated power over the subject of naturalization is the inherent power of Congress to exclude aliens from the United States This is absolute In the words of the Court That the government of the United States through the action of the legislative department can exclude aliens from its territory is a proposition which we do not think open to controversy Jurisdiction over its own territory to that extent is an incident of every independent nation It is a part of independence If it could not exclude aliens it would be to that extent subject to the control of another power The United States in their relation to foreign countries and their subjects or citizens are one nation invested with powers which belong to independent nations the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory [130] By the Immigration and Nationality Act of June 27 1952 some thirty one categories of alien are excluded from the United States including aliens who are or at any time have been members of or affiliated with any organization that advocates or teaches the overthrow by force violence or other unconstitutional means of the Government of the United States [131]

With the power of exclusion goes [illegible] the power to assert a considerable degree of control [illegible] aliens after

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United States *see* 66 Stat 163 tit 3 §§ 349 357 Congress's power over naturalization is an exclusive power A State cannot [illegible] eign subject who has not complied with federal [illegible] constitute him a citizen of the United States or of the State [illegible] prive the federal courts of jurisdiction over a [illegible] and a citizen of a State Chirac v Chirac 2 Wheat [illegible] power to naturalize aliens may be and early was [illegible] upon state courts having a common law jurisdiction [illegible] 217 U S 509 (1910) where it is also held that Congress [illegible] the punishment of the false swearing in such proceedings [illegible] States may confer the right of suffrage upon [illegible] declared their intention to become citizens and have [illegible] Spragius v Houghton 3 Ill 377 (1840) Stewart v Foster [illegible] 110 (1809)

[130] Chinese Exclusion Case 130 U S 581 603 [illegible] Yue Ting v U S 149 U S 698 705 (1893) Japanese Immigrant Case [illegible] U S 86 (1903) Turner v Williams 194 U S 279 [illegible] Adams 228 U S 585 (1913) Hines v Davidowitz 312 U S [illegible]

[131] 66 Stat 163 tit 2 § 212

as far down as 1868 American courts often implicitly accepted this principle Our Secretaries of State on the other hand usually asserted the doctrine of expatriation in their negotiations with other governments respecting the rights abroad of American citizens by naturalization and on July 27 1868 Congress passed a resolution declaring the latter doctrine to be a fundamental principle of this Government one not to be questioned by any of its officers in any of their opinions orders decisions etc [126] Then by an act passed in 1907 although since repealed in this respect Congress enacted that any woman marrying a foreigner should take the nationality of her husband To the contention that this provision deprived American citizens of their constitutional right to that status the Court replied that the maintenance of the ancient principle of the identity of husband and wife was a reasonable requirement of international policy a field in which the National Government was invested with all the attributes of sovereignty While Congress said the Court may not arbitrarily impose a renunciation of citizenship yet marriage with a foreigner was tantamount to voluntary expatriation [127] And for like reasons Congress may provide that naturalized citizens shall lose their acquired status under certain conditions by protracted residence abroad although their minor children born in the United States not sharing the parent s intention in the eyes of the law do not share his fate [128] And in the light of these precedents legislative and judicial it would seem to be within Congress s power whenever the public safety might be reasonably deemed to require it to enact that American citizens of dual nationality take an oath of fealty to the United States repudiating all claims of any other government upon their allegiance on pain of otherwise being considered to have expatriated themselves [129]

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[129] For acts which today constitute a renunciation of citizenship of the

ruptcy) Yet the creditor's interest has not been lost sight of since it is usually better secured especially in times of financial depression by conservation of the debtor's resources than by their sale and distribution

To be sure a closely divided Court held in 1936 that Congress could not extend the benefits of voluntary bankruptcy proceedings to municipalities and other political subdivisions of the States since to do so would be to invade the rights of the States even though the act required that they first give their consent to such proceeding but this decision was speedily superseded by one to the contrary effect which is now law of the land[136]

While Congress is not forbidden to impair the obligation of contracts (*see* Article I Section X ¶1) in legislating regarding bankruptcies it may not under the Fifth Amendment unduly invade the property rights of creditors which however is just what in the opinion of a unanimous Court it attempted to do by the Frazier Lemke Farm Moratorium Act of 1933 A revised act designed to meet the Court's objections was in due course challanged and sustained[137]

¶5 To coin money regulate the value thereof and of foreign coin and fix the standard of weights and measures

The Currency Power

The framers of the Constitution apparently assumed a bimetallic currency and the power to regulate the value thereof was probably thought of chiefly as the power to regulate the value of lesser coins in relation to the dollar and the metallic content of the two kinds of dollars with a view to keeping both gold and silver in circulation As a result of Civil War legislation however Congress established its power to authorize paper money with the quality of legal tender in the payment of debts both past and future while by the Gold Clause cases of 1934 it is recognized as possessing the power to lower the metal content of the dollar in order to stimulate prices In short the

[136] The case just cited and United States v Bekins 304 U S 27 (1938)

[137] Louisville Joint Stock Land Bank v Radford 295 U S 555 (1935) Wright v Vinton Branch etc 300 U.S 440 (1937)

their admission to the country By the aliens Registration Act of 1940[130] it was provided that all aliens in the United States fourteen years of age and over should submit to registration and finger printing and wilful failure to do so was made a criminal offense against the United States The Act of June 27 1952 repeats these requirements and recent decisions which ascribe to the Executive certain inherent powers in the same field enlarge them[131] In theory however they are all reasonable concomitants of the exclusion power and do not embrace the right to lay down a special code of conduct for alien residents of the United States to govern private relations with them[132]

The Bankruptcy Power Congress s power in the field of bankruptcy legislation has been a steadily growing power In the words of Justice Cardozo summarizing Mr Warren s volume on the subject The history is one of an expending concept but of an expanding concept that has had to fight its way Almost every change has been hotly denounced in its beginning as a usurpation of power Only time or judicial decision has had capacity to silence opposition At the adoption of the Constitution the English and Colonial bankruptcy laws were limited to traders and to involuntary proceedings An Act of Congress passed in 1800 added bankers brokers factors and underwriters Doubt was expressed as to the validity of the extension which established itself however with the passing of the years Other classes were brought in later through the Bankruptcy Act of 1841 and its successors until now practically all classes of persons and corporations are included[133] And whereas bankruptcy legislation was originally framed solely from the point of view of the immediate reimbursement of creditors it is today designed also as a relief to debtors and as a mode of putting them back on their feet (voluntary bank

[130] 54 Stat 670 sustained in Hines v Davidowitz 312 U S 52 69 70 (1941)

[131] Knauff v Shaughnessy 338 U S 537 (1950) Carlson v Landon 342 U S 524 (1952) Harisiades v Shaughnessy 342 U S 580 587 (1952) *United States v Spector 343 U S 169 (1952)*

[132] Keller v U S 213 U S 138 (1909)

[133] Ashton v Cameron County etc 298 U S at pp 535 536 (1936) Charles Warren *Bankruptcy in United States History* 9 (Boston 1935)

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While Congress is not forbidden to "impair the obligation of contracts" (*see* Article I, Section X, ¶1) in legislating regarding bankruptcies, it may not under the Fifth Amendment unduly invade the property rights of creditors, which, however, is just what in the opinion of a unanimous Court it attempted to do by the Frazier-Lemke Farm Moratorium Act of 1933. A revised act, designed to meet the Court's objections, was in due course challanged and sustained.[137]

¶5. To coin money, regulate the value thereof, and of foreign coin, *and fix the standard of weights and measures;*

The Currency Power

The framers of the Constitution apparently assumed a bimetallic currency, and the power to regulate "the value thereof" was probably thought of chiefly as the power to regulate the value of lesser coins in relation to the dollar and the metallic content of the two kinds of dollars with a view to keeping both gold and silver in circulation. As a result of Civil War legislation, however, Congress established its power to authorize paper money with the quality of legal tender in the payment of debts, both past and future; while by the Gold Clause cases of 1934 it is recognized as possessing the power to lower the metal content of the dollar in order to stimulate price. In short, the

[136] The case just cited and United States v. Bekins, 304 U.S. 27 (1938).

[137] Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935); Wright v. Vinton Branch, etc., 300 U.S. 440 (1937).

"value thereof" comes to mean "value" in the sense of purchasing power. Nor may private parties by resort to the gold clause device contract themselves out of the reach of Congress's power thus to lower the purchasing power of the dollar.[138] (See also ¶2 above.)

¶6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

This clause of the Constitution is superfluous. Congress would have had this power without it under the coefficient clause.[139] (See ¶18 below.)

¶7. To establish post offices and post roads;

The Postal Clause In earlier times narrow constructionists advanced the theory that these words did not confer upon Congress the right to *build* post offices and post roads, but only the power to *designate* from existing places and routes those which should serve as post offices and post routes.[140] The debate on the subject was terminated in 1876 by the decision in Kohl v. United States[141] sustaining a proceeding by the United States to appropriate a parcel of land in Cincinnati as a site for a post-office and courthouse.

It is from this clause also that Congress derives its power to carry the mails, which power comprehends the power to protect them and assure their quick and efficient distribution;[142] also the power to prevent the postal facilities from being abused for purposes of fraud and exploitation or for the distribution of legitimately forbidden matter.[143] Indeed it may close the mails to induce conformity with regulations within its power to enact.[144] But all restraints

[138] Phanor J. Eder, "The Gold Clause Cases in the Light of History," 23 *Georgetown Law Journal* 359, 388 and 722, 760; *also* cases cited in note 28 above. *Cf.* Perry v. U.S., 294 U.S. 330 (1935).

[139] *See e.g.* United States v. Marigold, 9 How. 560, 568 (1850); Fox v. Ohio, 5 How. 410 (1847); Baender v. Barnett, 255 U.S. 224 (1921).

[140] United States v. Railroad Bridge Co., Fed. Cas. No. 16,114 (1855).

[141] 91 U.S. 367.

[142] *In re* Debs, 158 U.S. 564 (1895).

[143] *In re* Rapier, 143 U.S. 110 (1892); Public Clearing House v. Coyne, 194 U.S. 497 (1904); Lewis Pub. Co. v. Morgan, 229 U.S. 288 (1913); Hannegan v. Esquire, Inc., 327 U.S. 146 (1946); Donaldson v. Read Magazine, 333 U.S. 178 (1948).

[144] Electric Bond and Share Co. v. S.E.C., 303 U.S. 419 (1938).

on the use of the mails are in general subject to judicial review because of the close connection between the subject and freedom of the press

¶8 To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries

Patents and Copyrights

Congress may exercise the power conferred by this clause by either general or special acts but the provision has reference only to writings and discoveries which are the result of intellectual labour and exhibit novelty [145] Nor is Congress authorised by the clause to grant monopolies in the guise of patents or copyrights and the rights which the present statutes confer are subject to the Anti Trust Act [146] Also patented articles are subject to the police power and the taxing power of the States but must not be discriminated against as such [147] and a State may tax royalties from patents or copyrights as so much income a decision to the contrary effect in 1928 having been later overruled [148] The term writings has been given an expanded meaning and covers photographs and photographic film [149] On the other hand it was held in the Trade Mark cases[150] that a trade mark is neither a writing nor discovery within the sense of the clause with the result that Congress could validly legislate for their protection only as they were instruments of foreign or interstate commerce Not improbably however, recently established views of Congress s protective power over commerce and its instruments would today vindicate the kind of act which was overturned in 1879 The international agreements on the subject of

[145] Higgins v Keuffel 140 U S 431 (1891) Cuno Engineering Corp v Automatic Devices Corp 314 U S 84 (1941) E Burke Inlow *The Patent Grant* (Johns Hopkins Press 1950) ch VI

[146] See Motion Picture Patents Co v Universal Film Mfg Co 243 U S 502 (1917) Morton Salt Co v G S Suppiger Co 314 U S 488 (1942) United States v Masonite Corp 316 U S 265 (1942) United States v New Wrinkle Inc 342 U S 37 (1952) Inlow ch V

[147] Patterson v Ky 97 U S 503 (1877) Webber v Va 103 U S 347 (1880) *See also* Watson v Buck 313 U S 387 (1941)

[148] The cases referred to are Long v Rockwood 277 U S 142 (1928) and Fox Film Co v Doyal 286 U S 123 (1932)

[149] Burrows Giles Lithographic Co v Sarony 111 U S 53 (1884)

[150] 100 U S 62 (1879)

basis of the fact that even before the Constitution was adopted the American people had asserted their right to wage war as a unit and to act in regard to all their foreign relations as a unit that these powers were an attribute of sovereignty and hence not dependent upon the affirmative grants of the Constitution[154] A third view was adumbrated by Chief Justice Marshall who in McCulloch v Maryland listed the power to declare *and conduct* a war as one of the "enumerated powers" from which the power of the National Government to charter the Bank of the United States was deducible[155] During the Civil War the two latter theories were both given countenance by the Supreme Court[156] Then following World War I the Court speaking by Justice Sutherland plumped squarely for the attribute of sovereignty theory Said he The power to declare and wage war to conclude peace to make treaties to maintain diplomatic relations with other sovereignties if they had never been mentioned in the Constitution would have vested in the Federal Government as necessary concomitants of nationality[157] and although the Court in 1948 lent its sanction perhaps somewhat casually to the "enumerated powers" theory[158] there can be no doubt that the attribute of sovereignty theory does fullest justice to the actual holdings of the Court and especially to those rendered in the course of or in consequence of World War II

When we are at war we are not in revolution the late Chief Justice Hughes once declared[159] The fact is

[154] Penhallow v. Doane, 3 Dall. 54.
[155] 4 Wheat. 316, 407 (1819) (emphasis supplied).
[156] *Ex parte Milligan*, 4 Wall. 2, 139 (1866) (dissenting opinion); Hamilton v. Dillin, 21 Wall. 73, 86 (1875). *See also* 53 *Cong. Globe*, 37th Cong., 1st sess., app. 1 (1861); Miller v. U.S., 11 Wall. 268, 305 (1871); and United States v. Macintosh v. U.S., 283 U.S. 605, 622 (1931).
[157] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316-318 (1936). *See* also the same Justice's sweeping opinion for the Court on the scope of the War Power in relation to private rights, in United States v. Macintosh, 283 U.S. 605, at 622 (1931).
[158] Lichter v. U.S., 334 U.S. 742, 755, 757-758 (1948).
[159] Address before the American Bar Association at Saratoga, September 1917. [illegible] Charles Evans Hughes, [illegible] (N.Y. [illegible]). In his opinion for the Court in 1934 in the Minnesota Moratorium case Chief Justice Hughes says "The war power of the Federal Government is a power to wage war successfully and thus permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve

(WPB) exercised in control of the distribution of materials and facilities and of industrial production and output during World War II and the almost equally great powers which the Office of Price Administration (OPA) exercised in rationing supplies and controlling prices rents and wages without any restraint by the courts— almost in fact without their exercise of power being challenged in court[163]

The Impact of Total War on Private Rights the West Coast Japanese

And what Total War can do to personal rights despite the due process clause and despite its chosen instrument judicial review is shown by the measures which the National Government adopted early in the recent war respecting Japanese residents on the West Coast What in brief these measures accomplished was the removal of 112 000 Japanese two thirds of them citizens of the United States by birth from their homes and properties and their temporary segregation in assembly centers later in relocation centers No such wholesale or drastic invasion of the rights of citizens of the United States by their own Government had ever before occurred in the history of the country Nevertheless taking judicial notice of the dubious state of our defenses on the West Coast and of the reasonable apprehension of invasion following the attack on Pearl Harbor of the manifest sympathy of many Japanese residents for Japan and the consequent danger of " Fifth Column activities and of certian other more or less speculative possibilities and asserting the broad scope of the blended powers of Congress and the President in war time the Court said We cannot say that these facts and circumstances considered in the parcticular war setting could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States The

[163] As to WPB s powers *see* relevant portion of Second War Powers Act of March 27 1942 U S Code Supp V tit 50—War Appx —§§633 636a Steuart &Bro Inc *v* Bowles 322 U S 398 (1944) John Lord O Brian and Manly Fleischmann 'The War Production Board Administrative Policies and Procedures reprint from *George Washington Law Review* December 1944 On OPA s powers *see* Emergency Price Control Act of January 30 1942 as amended U S Code Supp V—War Appx — §§901 924 Yakus *v* U S 321 U S 414 (1944) Bowles *v* Willingham 321 U S 503 (1944) Case *v* Bowles 327 U S 92 (1946) Against enemies of the United States the War Power is constitutionally unlimited Brown *v* U S, 8 Cr 110 (1814) Miller *v* U S 11 Wall 268 (1870)

theater of military operations may have been a material factor in the war s outcome

Far different was the outlook of President Roosevelt s message to Congress of September 7 1942 in which he proclaimed his intention and his constitutional right to disregard certain provisions of the Emergency Price Control Act unless Congress repealed them by the following October 1 The American people said he can be sure that I will use my powers with a full sense of my responsibility to the constitution and to my country When the war is won the powers under which I act will automatically revert to the people to whom they belong While the situation which the President foreshadowed did not materialize thanks to Congress s compliance with his demand albeit a day late yet any candid person must admit the possibility of conditions arising in which the safety of the republic would require the waiving of constitutional methods When Mr Hughes uttered his dictum the atomic bomb had not been invented or used against civilian populations The circumstances of atomic warfare would not improbably bring about the total supplantation for an indefinite period of the forms of constitutional government by the drastic procedures of military government

The Power to Prepare for war the Atomic Energy Act

To some indeterminate extent the power to wage war includes the power to prevent it It was on this ground in part that following World War I the Court sustained T V A as a legitimate governmental enterprise[164] But the outstanding example of legislation adopted at a time when no actual shooting war was in progress with the object of providing for the national defense, is the Atomic Energy Act of 1946 That law establishes an Atomic Energy Commission of five members which is empowered to conduct through its own facilities or by contracts with or loans to private persons research and developmental activities relating to nuclear processes the theory and production of atomic energy and the utilization of fissionable and radio active materials for medical industrial and other purposes

[164] 297 U.S 298 327 328 (1936) *See* also 2 Story *Commentaries* §1185

measures in question were therefore pronounced valid, but with the later stipulation by the Court that they must be construed and applied strictly as anti espionage and anti-sabotage measures not as concessions to community hostility toward the Japanese A Japanese citizen accordingly, whose loyalty the Government did not challenge was held to be entitled at any time to unconditional release from a relocation center At the same time it was clearly implied that the privilege of the writ of *habeas corpus* was always available in like cases unless suspended for reasons deemed by the Constitution to be sufficient [164]

Can the Constitution Be Suspended in Wartime ?

The question arises whether this same *habeas corpus* privilege aside the Constitution contemplates the possibility of its own suspension in any other respect in time of war or other serious crisis In the Milligan case which was decided shortly after the Civil War a majority of the Court took pains to stigmatize any such idea in the strongest terms No doctrine said Justice Davis involving more pernicious consequences was even invented by the wit of man than that any of its [the Constitution s] provisions can be suspended during any of the great exigencies of government [165] Unfortunately this strongly worded assertion is contradicted by the very decision in justification of which it was pronounced for this held Milligan to have been deprived of his constitutional rights and his was but one of many such cases President Lincoln s policy as to which based on the theory that the entire country was a

[164] Hirabayashi *v* U S 320 U S 81 (1943) Korematsu *v* U S 323 U S 214 (1944) *ex parte* Endo 323 U S 283 (1944) It is perhaps pardonable to indulge a mild skepticism as to the alleged necessity for the Japanese segregation measures Certainly chronology supports such skepticism The Japanese attack on Pearl Harbor occurred December 7 1941 Yet it was not until February 19 that this policy was inaugurated by the President s order nor until March 21 that Congress acted and the Civilian Exclusion Order did not come till May 3—five months after Pearl Harbor ! What was the real cause then of the segregation measures—increased danger of Japanese invasion to be aided by sabotage in the United States or increased pressure from interested and/or hysterical groups of West Coast citizens ? Had the authorities stopped short with a curfew order enforcible by the police they would have taken ample precaution *Not one single Japanese citizen or otherwise either in continental United States or in Hawaii was found guilty of one single effort at sabotage or espionage*
[165] 4 Wall 2 121 (1866)

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[166] 297 U.S 298 327 328 (1936) *See* also 2 Story *Commentaries* §1185

The act further provides that the Commission shall be the exclusive owner of all facilities (with minor exceptions) for the production of fissionable materials that all fission able material produced shall become its property that it shall allocate such materials for research and developmental activities and shall license all transfers of source materials The Commission is charged with the duty of producing atomic bombs bomb parts and other atomic military weapons at the direction of the President Patents relating to fissionable materials must be filed with the Commission the just compensation payable to the owners to be determined by a Patent Compensation Board designated by the Commission from among its employees [167]

Again the War Power is not limited to victories in the field It carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress [168] So spoke the Court in Reconstruction days Yet this power cannot be without metes and bounds For as the Court has recognized if the war power can be used in days of peace to treat all the wounds which war inflicts on our society it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments [169] The issue thus adumbrated is not susceptible of cut and-dried solutions [170]

The bearing of Congress s power to declare war upon the President s power to conduct hostilities in protection of American interests abroad is treated in connection with the latter subject (*See* pp 125 127 below)

Letters of marque and reprisal were formerly issued to privateers sometimes for the purpose of enabling their grantees to wage a species of private war upon some state against which they had a grievance Because of the ban which International Law has put upon privateering increasingly since the Declaration of Paris of 1856 this power of Congress must today be deemed obsolete

[167] 60 Stat 755 (1948) [168] Stewart v Kahn 11 wall 493 507 (1871)
[169] Woods v Miller 333 U S 138 144 (1948)
[170] *Cf* Chastleton v Sinclair 264 U S 543 (1924) and Ludecke v Watkins 335 U S 160 170 (1948)

¶12 To raise and support armies but no appropriation of money to that use shall be for a longer term than two years

¶13 To provide and maintain a navy

The Air Force

The office of these clauses is to assign the powers which they define and which are part of the War Power to *Congress* since otherwise they might have been claimed by analogy to the British constitution for the President [171] When Congress by the National Security Act of 1947 set up the Air Force as a separate service not mentioned in the Constitution its constitutional power to do so was conceded [172]

Development of Conscription

The only type of standing army known to the Framers was a mercenary volunteer force and the only compulsory type of military service known to them was service in the militia which was confined to local and limited purposes as it had been in medieval England and as it still is in clause 15 below Conscription was first employed to raise an army for service abroad in World War I [173] and the first peacetime conscription was that authorized bv the Selective Training and Service Act of September 16 1940 which as enacted forbade the sending of selectees outside the Western Hemisphere except to possessions of the United States and the Philippine Islands [174] Following Pearl Harbor this restriction was quickly suspended for the duration [175] Conscription for recruitment of the Navy rests on a more ancient precedent namely impressment into the British Navy which although confined to seamen antedated 1789 (*See also* Amendment XIII)

[171] 2 Story *Commentaries* §1187

[172] A California member of the House introduced a resolution looking to a constitutional amendment authorizing the establishment of an air force (H J Res 298 80th Cong 2nd sess) but nothing happened to it

[173] The act was sustained in the Selective Draft Cases 245 U S 366 (1918) The same Act of June 15 1917 gave the President sweeping powers to commandeer shipbuilding plants and facilities Commenting on this feature of the act in United States v Bethlehem Steel Corp 315 U S 289 (1942) the Court said Under the Constitutional authority to raise and support armies to provide and maintain a navy and to make all laws necessary and proper to carry these powers into execution the power of Congress to draft business organizations is not less than its power to draft men for battle service *Ibid* 305

[174] U S Code tit 50 §303

[175] *Ibid* §751

Limitation of appropriations for the Army to two years reflects the American fear of standing armies For the Navy and Air Force on the other hand building programs may be laid down to run over several years

The power to create an Army Navy and Air Force involves naturally the power to adopt measures designed to safeguard the health and welfare of their personnel and such measures are enforcible within the States Thus Congress may authorize the suppression of houses of ill fame in the vicinity of places where military personnel are stationed[176]

¶14 To make rules for the government and regulation of the land and naval forces

It is by virtue of this paragraph that Congress has enacted the so called Articles of War and Articles for the Government of the Navy which constitute the basis of military and naval discipline This clause too is superfluous except for the purpo e of vesting Congress with a power which might be otherwise claimed exclusively for the Commander in Chief

National Purposes of the Militia

¶15 To provide for calling forth the militia to execute the laws of the Union suppress insurrections and repel invasions

Congress passed such an act in 1795 which still remains on the statute books It leaves with the President the right to decide whether an insurrection exists or an invasion threatens[177]

¶16 To provide for organizing arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States re erving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress

The militia was long regarded as a purely State affair but

176 McKinley v U S 249 U S 397 (1919) *See also* Wissner v Wissner 338 U S 655 660 (1950)

177 Martin v Mott 12 Wheat 19 (1827) U S Code tit 32 §81 (a)

in the National Defense Act of June 3 1916 the militia of the United States is defined as consisting 'of all able bodied male citizens of the United States and all similar declarants between the ages of 18 and 45 The same act also provides for the nationalization of the National Guard which is recognized as constituting a part of the militia of the United States and provides for its being drafted into the military service of the United States in certain contingencies[178] The act rests on the principle that the right of the States to maintain a militia is always subordinate to the power of Congress 'to raise and support armies a doctrine which has received the sanction of the Supreme Court[179] (*See also* Section X ¶3)

Who Comprise the *Militia*

¶17 To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular States and the acceptance of Congress become the seat of the Government of the United States and to exercise like authority over all places purchased by the consent of the legislature of the S ate in which the same shall be for the erection of forts magazines arsenals dockyards and other needful buildings and

This paragraph is of course the source of Congress s power to govern the District of Columbia Congress itself however is not required to exercise this power but may at any time create a government for the District and vest in it the same range of law making power as it has always customarily vested in territories of the United States In 1871 it did in fact do so and while this government was later (1878) abolished and the present system instituted certain of its legislative acts forbidding discrimination by restaurants against Negroes are still in force[180]

The District of Columbia

It used to be thought that a State s consent to surrender of jurisdiction under this paragraph had to be substantially unqualified but recent decisions hold that a State may

[178] U S Code tit 32 §§1 81 84

[179] Selective Draft Cases 245 U S 366 (1918) Cox v Wood 247 U S 3 (1918)

[180] District of Columbia v Thompson Co 346 U S 100 (1953)

concede and Congress accept a qualified jurisdiction Nor is the power of a State to concede and of the United States to receive and exercise jurisdiction over places purchased by the latter within the boundaries of the former limited by this paragraph In fact the paragraph is today largely superfluous [181]

¶18 To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer therof

The Co efficient Clause

What is a necessary and proper' law under this paragraph ? This question arose in 1819 in the great case of McCulloch v Maryland and was answered by Chief Justice Marshall thus *Let the end be legitimate let it be* within the scope of the Constitution and all means which are appropriate which are plainly adapted to that end which are not prohibited but consist with the letter and spirit of the Constitution are constitutional [182]

The basis of this declaration was furnished by three ideas First that the Constitution was ordained by the people and so was intended for their benefit secondly that it was intended to endure for ages to come and consequently to be adapted to the various crises of human affairs and thirdly that while the National Government is one of enumerated powers—a proposition which is today unqualifiedly applicable only to its internal powers—it is sovereign as to those powers Marshall s view was opposed by the theory that the Constitution was a compact of sovereign States and so should be strictly construed in the interest of safeguarding the powers of said States From this point of view the necessary and proper clause was urged to be a limitation on Congress s powers and was interpreted as meaning in substance that Congress could pass

[181] James v Dravo Contracting Co 302 U S 134 (1937) Collins v Yosemite Park and Curry Co 304 U S 518 (1938) Stewart & Co v Sandrakula 309 U.S 94 (1940)

[182] 4 Wheat 316 421 *See also ibid* 415

no laws except those which were absolutely necessary to carry into effect the powers of the General Government

Broadly speaking Marshall s doctrine has prevailed with the Court since the Civil War It is true that certain of its decisions touching the New Deal legislation narrowed Congress s discretion in the choice of measures for the effective exercise of national power by subordinating it to certain powers of the States of but susbsequent decisions indicate that this trend was only temporary In the Darby case [183] referred to earlier Justice Stone speaking for the Court asserts that Congress s powers under the necessary and proper clause are no more limited by the reserved powers of the States than are its more specific powers (*Cf* Article VI ¶2 and Amendment X)

The 'coefficient clause is further important because of the control which it gives Congress over the powers of the other departments of government but in this connection the doctrines of the Supreme Court at times confront the clause with certain inherent executive and judicial powers of which the Court itself is the final determinator [184]

Inherent Powers of the National Government

On an earlier page were listed certain inherent powers of the National Government claimed for it as concomitants of nationality as inherent in sovereignty or simply from the necessity of the case [185] In the words of the Court it is not lightly to be assumed that in matters requiring national action a power which must belong to and somewhere reside in every civilized government is not to be found [186] Moreover even constitutional power may be established by usage both in the case of Congress and in that of the President [187]

[183] 312 U S 100 (1941) followed in Fernandez *v* Wiener 326 U S 340 (1945) and Case *v* Bowles 327 U S 92 (1946)

[184] *Cf* Ex *parte* Grossman 267 U S 87 (1925) and Myers *v* U S 272 U S 52 (1926)

[185] *See* p 4 above

[186] Missouri *v* Holland 252 U S 416 433 (1920) quoting Andrews *v* Andrews 188 U S 14 33 (1903)

[187] Inland Waterways Corp *v* Young 309 U S 517 (1940) United States *v* Midwest Oil Co 236 U S 459 (1915)

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[187] Inland Waterways Corp v Young, 309 U S 517 (1940); United States v Midwest Oil Co, 236 U S 459 (1915).

SECTION IX

The purpose of this section is to impose certain limitations on the powers of Congress

¶1 The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight but a tax or duty may be imposed on such importation not exceeding ten dollars for each person

This paragraph referred to the African slave trade and is of course now obsolete It is still interesting nevertheless for the evidence it affords of the belief of the framers of the Constitution that under the power to regulate commerce Congress would be authorized to abridge it in favor of the great principles of humanity and justice [1]

¶2 The privilege of the writ of *habeas corpus* shall not be suspended unless when in cases of rebellion or invasion the Public safety may require it

The writ of *Habeas Corpus*

The writ of *habeas corpus* is the most important single safeguard of personal liberty known to Anglo American law Often traced to Magna Carta itself it dates from at latest the seventeenth century and it is interesting to note that the Constitution simply assumes that of course it will be a part of the law of the land The importance of the writ is that it enables anybody who has been put under personal restraint to secure immediate inquiry by a court into the cause of his detention and if he is not detained for good cause his liberty While the writ may not be used as a substitute for appeal it provides a remedy for jurisdictional and constitutional errors without limit as to time and may be used to correct such errors by military as well as by civil courts [3]

[1] United States v *The William* 28 Fed Cas No 16 700 (1808)

[2] Edward Jenks *Short History of English Law* 333 335 (Boston 1913) David Hutchinson *Foundations of the Constitution* 137 139 (New York 1928)

[3] United States v Smith 331 U S 469 475 (1949) Gusik v Schiller 339 U S 977 (1950)

Early in the Civil War President Lincoln without authorization by Congress temporarily suspended the privilege of the writ for the line of transit for troops en route to Washington thereby giving rise to the famous case of *ex parte* Merryman[4] in which Chief Justice Taney after vainly attempting to serve the writ filed an opinion denouncing the President s course as violative of the Constitution Whether the President or the Chief Justice was in the right seems to depend on whether the district for which the writ was suspended was properly to be regarded as within the field of military operations at this time for, if it was the President s power as Commander in Chief had full sway Subsequently Congress passed an act declaring the President authorized to suspend the writ whenever in his judgment the public safety may require it though whether authorized by the act or by the Constitution itself was not made clear[5]

¶ 3 No bill of attainder or *ex post facto* law shall be passed By this clause Congress is fordidden to pass bills of attainder and *ex post facto* laws In the following section a similar prohibition is laid upon the States It will be convenient to proceed as if both clauses were before us at this point

Bills of Attainder

In English history a bill of attainder was an act of Parliament charging somebody with treason and pronouncing upon him the penalty of death and the confiscation of his estates but following our Civil War a divided Court held in the famous Test Oath cases[6] that the clause ruled out any legislative act which inflicts punishment without a judicial trial and on this ground set aside certain statutes which by requiring persons who followed certain callings to take an oath declaring they had never borne arms against the United States excluded former members of the Confederate forces from the pursuit of their chosen professions And in 1946 the Court in reliance on these prece-

[4] Taney s Reps 246 (1861)

[5] *See* the present writer s *The President Office and Powers* (4th Ed 1957) 144-145

[6] *Ex parte* Garland 4 Wall 333 (1867) *See also* Cummings v Mo 4 Wall 277

dents, held void under this same clause a rider to a Congressional appropriation act which forbade the payment after a certain date of any compensation to three *named* persons then holding office by executive appointment unless prior to that date they had been reappointed by the President with the advice and consent of the Senate The Court took notice of the fact which does not appear in the rider itself that the three persons had been found by a House sub committee to have engaged in subversive activities as the sub committee defined this term it also construed the rider as intended to bar its victims from government service [7]

So from being a protection of life against legislative wrath the bills of attainder clause has become a protection of livelihood and recently a protection of livelihood at public expense That the rider in the above case might have been held void as an attempt by Congress to usurp the executive power of removal seems obvious the fact being notorious that—dollar a year men aside—people do not often serve government gratuitously A general provision aimed at officials advocating certain doctrines would present a different question

Ex Post Facto Laws

Although it was undoubtedly the belief of many of the framers of the Constitution that the ban here placed on *ex post facto* laws and its counterpart in Section X would henceforth rule out all retroactive legislation and particularly all special acts interfering with vested rights [8] the Court in the early case of Calder *v* Bull[9] confined the prohibition to retroactive *penal* legislation An *ex post facto* law today is a law which imposes penalties retroactively that is upon acts already done or which increase the

[7] United States *v* Lovett 328 U S 303 (1946) On June 13 1940 the House passed a bill later dropped ordering the Secretary of Labor to deport Harry Bridge to Australia his own country Professor Chafee (*Free Speech in the United States* 426 note) asks us to compare with this the bill of attainder by which Strafford was sent to the scaffold three hundred years before This seems a bit extravagant the presence of an alien in the United States being purely by leave and license of the National Government *See* Bugajewitz *v* Adams 228 U S 585 (1913)

[8] Story *Commentaries* §1345 note appended to J Johnson s opinion in Satterlee *v* Matthewson 2 Pet 380 681*ff* (1829)

[9] 3 Dall 386 (1798)

penalty for such acts but laws which might seem at first glance to do these things have been frequently sustained as within State legislative power Thus a New York statute which forbade physicians who had been convicted of certain offenses to continue in the practice of the medical profession was held out to be an *ex post facto law* as to one who prior to the passage of the act had been convicted of such an offense The Court held that since the statute merely laid down a thoroughly justifiable test of fitness for the practice of medicine and was entirely devoid of any punitive intent on it was well within the State s police power [10] Likewise laws which impose heavier penalties on old than on first offenders for the same offense are not considered to add an additional penalty to the old offender s previous crimes but merely to punish more suitably and effectively his latest crime [11]

While Congress may not pass *ex post facto* laws the President is not thus hampered in his capacity as Commander in Chief in wartime of our forces in the field Otherwise Presidents Roosevelt and Truman would be chargeable with violating the Constitution in agreeing at Yalta and Potsdam to the creation of the Nuremberg Court for the trial of leading Nazis on the charge of plotting war a crime not previously punishable under either Internatianal Law or any other law [12]

¶4 No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken

A capitation tax is a poll tax The requirement that such taxes should be apportioned grew in part at least out of the fear that otherwise Congress might endeavor by a heavy tax on negro slaves *per* poll to drive the peculiar institution out of existence [13] In other words the framers

[10] Hawker *v* N Y 170 U S 189 (1898)
[11] Graham *v* W Va 224 U S 616 (1912)
[12] *Cf* In re Yamashita 327 U S 1 26 (1946) for J Murphy s *dissenting* opinion and Hirota *v* MacArthur 338 U S 197 198 (1948) for concurring opinion of J Douglas *See also* the article by Leo Gross on The Criminality of Aggressive War in 41 *American Political Science Review* (April 1947) 205 225
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[13] Ware v Hylton 3 Dall 171 (1796)

were of the opinion later voiced by Marshall that "the power to tax involves the power to destroy and may be used for that purpose

Direct tax was defined under Section VIII ¶1 (*See* P 27 above)

¶5 No tax or duty shall be laid on *articles exported from* any State

Exported mean exported to a foreign country[14] This provision has been held applicable even to general imports with respect to goods in process of being sold for exportation[15] Although the conditions in light of which this provision was framed have long since disappeared it is good to be informed that there is still something which Congress cannot clamp a tax on

¶6 *No preference shall be given by any regulation of commerce* or revenue to the ports of one State over those of another nor shall vessels bound to or from one State be obliged to enter clear or pay duties in another

Appropriations and Expenditures

¶7 No money shall be drawn from the Treasury but in consequence of appropriations made by law and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time

This paragraph is obviously addressed to the Executive *whose power is thus assumed to embrace that of expenditure* Early appropriations in fact took the form of lump sum grants and today there is a tendency to revert to this earlier practice as is seen in the appropriations which Congress has made in recent years for public works and relief, not to mention the sweeping terms in which appropriations are made in war time for the use of the Army and Navy It seems clear that such grants to an executive agency do not violate the maxim against delegation of legislative power first because the function of expenditure is historically an executive function secondly because appropriation acts are not laws in the true sense of the term,

[14] Woodruff v Parham 8 Wall 133 (1868)

[15] Spalding and Bros v Edwards 262 U S 66 (1923) *Cf* Peck & Co v Lowe 247 U S 165 (1918)

inasmuch as they do not lay down general rules of action for society at large Rather they are administrative regulations, and may go into detail or not as the appropriating body—Congress—may choose [16]

The above clause was once violated by none other than Abraham Lincoln who early in the Civil War paid out two millions of dollars from unappropriated funds in the Treasury to persons unauthorized to receive them for confidential services deemed by him to be of the utmost necessity at the time [17] But this exception does not dispose of the fact that the clause is the most important single curb in the Constitution on Presidential power Congressional measures intended to curb him directly the President can always veto and his veto will be effective nine times out of ten But a President cannot do much very long without funds and these Congress can withhold from him simply by inaction [18]

The Legislative Rider : Loyalty

The question has sometimes arisen whether Congress by attaching provisos or riders to its appropriations is constitutionally entitled to lay down conditions by which the President becomes bound if he accepts the appropriation even though otherwise Congress could not have controlled his discretion as for example in disposing the Army and Navy A logically conclusive argument can be made on either side of this question which being of a political nature appears to have been left to be determined by the tussle of political forces

A more unusual type of rider appears in certain recent appropriation acts The 79th Congress in its second session incorporated in a whole series of such measures clauses which forbid the use of any of the funds appropriated to pay the salary of any person who advocates or belongs

[16] *See* the present writer s Constitutional Aspects of Federal Housing 84 *University of Pennsylvania Law Review* 131 156 (1935) *also* Cincinnati Soap Co v U S 301 U S 308 321 (1937)

[17] 6 Richardson *Messages and Papers* 77 79 Ed of 1909

[18] *See generally* Lucius Wilmerding *The Spending Power A History of the Efforts of Congress to Control Expenditures* (New Haven Yale University Press 1943) The author shows that once funds are voted the various devices which Congress has employed to control their expenditure have worked with very indifferent success

to an organization which advocates the overthrow of the Government by force or any person who strikes or who belongs to an organization of Government employees which asserts the right to strike against the Government [19] The apparent intention of this proviso is to lay down a rule by which the appointing and disbursing authorities will be bound Since Congress has the conceded power to lay down the qualifications of officers and employees of the United States and since few people would contend that officers or employees of the National Government have a constitutional right to advocate its overthrow or to strike against it the above proviso would seem to be perfectly constitutional Former President Truman s Loyalty Order —Executive Order 9835—of March 22 1947 was an outgrowth in part of this legislation

¶8 *No title of nobility shall be granted by the United States and no person holding any office of profit or trust under them shall without the consent of the Congress accept of any present emolument office or title of any kind whatever from any king prince or foreign State*

The above provision has never been interpreted as preventing the wives and daughters of those holding office from accepting all sorts of presents even gold crowns from foreign potentates

SECTION X

Restraints on the States

¶1 *No State shall enter into any treaty alliance or confederation grant letters of marque and reprisal coin money emit bills of credit make anything but gold and silver coin a tender in payment of debts pass any bill of attainder ex post facto law or law impairing the obligation of contracts or grant any title of nobility*

Because of the restrictions imposed on them by this paragraph and ¶3 below as well as those which result from the powers of the National Government the States of the

[19] H R 5201 5400 5452 5605 5671 5990 5990 6036 6335 6429 6496 6601 6739 6777 6837 6885 H J 300 *Digest of Public Bills* 79th Congress 2d Sess a (1946)

Union retain only a very limited capacity at International Law and may exercise that only by allowance of Congress[1]

As the context shows the kind of treaty here referred to is one whose purpose is the setting up of an arrangement of a distinctly political nature (*See* ¶3 below)

Bills of credit are bills based on the credit of the State Banks chartered by a State may issue notes of small denomination despite this provision although of course they can not be given the quality of legal tender and since 1866 such notes have been subject to such a heavy tax by the United States as to render them unprofitable[2] (*See* Article I Section VIII ¶2)

The Obligation of Contracts Clause

A law impairing the obligation of contracts is a law materially weakening the commitments of one of the parties thereto or making its enforcement unduly difficult as by the repeal of essential supporting legislation[3]

The clause was framed primarily for the purpose of preventing the States from passing laws to relieve debtors of their legal obligation to pay their debts the power to afford such relief having been transferred to the National Government[4] (*see* Section VIII ¶4) Later the Supreme Court under Chief Justice Marshall in an effort to offset the narrow construction given the ban on *ex post facto* legislation in Calder v Bull (*see* p 78 above) extended the protection of the clause first to public grants of land then to exemptions from taxation then in the celebrated Dartmouth College case to charters of corporations[5]

Yet even with this extension the clause nowadays no longer interferes seriously with the power of the States to protect the public health safety and morals or even that larger interest which is called the general welfare for the

[1] *The President Office and Powers* (4th Ed) 173 174 Chief Justice Taney s opinion in Holmes *v* Jennison 14 Pet 540 (1841) Skiriotes *v* Fla 313 U S 69 (1941) United States *v* Calif 332 U S 19 (1947)

[2] Briscoe *v* Bank of Ky 11 Pet 257 (1837) Veazie Bank *v* Fenno 8 Wall 533 (1869)

[3] Home Building and Loan Asso *v* Blaisdell 290 U S 398 431 435 (1934) Von Hoffman *v* Quincy 4 Wall 535 552 (1867)

[4] Sturges *v* Crowninshield 4 Wheat 122 (1819)

[5] Fletcher *v* Peck 6 Cranch 87 (1810) New Jersey *v* Wilson 7 Cranch 164 (1812) Dartmouth College *v* Woodward 4 Wheat 518 (1819)

simple reason that a State has no right to bargain away this power[6] Moreover nothing passes by implication in public grants which are accordingly construed in favor of the State whenever possible[7] Thus the mere fact that a corporation has a charter enabling it to manufacture intoxicating beverages will not protect it from the operation of a prohibition enactment[8] Similarly a contract between two persons by which they agree to buy and sell intoxicating beverages would be immediately cancelled by a prohibition law going into effect[9] And in recent times the Court has relaxed its standards in cases affecting private contracts Thus in the Minnesota Moratorium case the Court held that a State could in the midst of an industrial depression enable debtors to postpone meeting their obligations for a reasonable period[10]

The Police Power

Generally speaking the protection afforded by this clause does not today go much if at all beyond that afforded by Section I of the Fourteenth Amendment In the words of the Court It is settled that neither the contract clause nor the due process clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health safety good order comfort or general welfare of the community[11]—in short its police power And what *is* reasonably necessary for these purposes is today a question ultimately for the Supreme Court and the present disposition of the Court is to put the burden of proof upon any person who challenges State action as *not* reasonably necessary[12]

[6] Stone v Miss 101 U S 814 (1879)
[7] Charles River Bridge Co v Warren Bridge Co 11 Pet 420 545 554 (1837) Blair v Chicago 201 U S 400 (1906)
[8] Boston Beer Co v Mass 97 U S 25 (1877)
[9] Manigault v Springs 199 U S 473 (1905)
[10] 290 U S 398 (1934) Cf Bronson v Kinzie 1 How 311 (1843) McCracken v Hayward 2 How 608 (1844)
[11] Atlantic Coast Line Co v Goldsboro 232 U S at 558 (1914)
[12] *See* such recent cases as Helvering v Northwest Steel Rolling Mills 311 U S 46 (1940) and Gelfert v National City Bk 313 U S 221 (1941) In Higginbotham v Baton Rouge 306 U S 535 (1939) it was held that the "obligation of contracts" clause does not protect a right to office The same result had been reached nearly a century earlier in Butler v Pa 10 How 402 (1851) For a statistical survey of the rise and decline of the obligation clause as a restraint on State power *see* Benjamin F Wright's *Contract Clause of the Constitution* (Harvard University Press 1938) ch IV

Till after the Civil War the principal source from which cases stemmed challenging the validity of State legislation the obligation of contracts clause is today of negligible importance and might well be stricken from the Constitution For most practical purposes in fact it has been

¶2 No State shall without the consent of Congress lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws and the net produce of all duties and imposts laid by any State on imports or exports shall be fo the use of the Treasury of the United States and all such laws shall be subject to the revision and control of the Congress

Imports and 'exports refer only to goods brought from or destined to foreign countries[13] A tax on imports still in the original package and in the hands of the importer is prohibited by this clause[14]

¶3 No State shall without the consent of Congress lay any duty of tonnage keep troops or ships of war in time of peace enter into any agreement or compact with another State or with a foreign power or engage in war unless actually invaded or in such imminent danger as will not admit of delay

Cooperative Federalism Interstate Compacts

The full possibilities of securing cooperation among States by means of agreement or compact sanctioned by Congress have only begun to be realized within recent times[15] In 1834 New York and New Jersey entered into such a compact for fixing and determining the rights and obligations of the two States in and about the waters between them and in 1921 by a further agreement they created the Port of New York District and established the Port of New York Authority which is a body both corporate

[13] Woodruff v Parham 8 Wall 133 (1868) Sonneborn Bros v Cureton 262 U S 506 (1923) *Cf* however Baldwin v Seeling 294 U S 511 (1935) where a different view was advanced but quite unnecessarily for the decision of the case and probably inadvertently

[14] Brown v Md 12 Wheat 419 (1827)

[15] *See* Frankfurter and Landis The Compact Clause of the Constitution —A Study in Interstate Adjustments 34 *Yale Law Journal* 685 735 (1925) Frederick L Zimmerman and Mitchell Wendell *Interstate Compacts since 1925* (1951) 8 *Book of States* 26 (1950-1951)

and politic for the comprehensive development of the port Two years later Congress was asked to sanction an agreement among seven western States which had for its purpose the reclamation of a vast stretch of arid land in the great Colorado River basin Then in May 1934 seven northeastern States signed a compact looking to the establishment within their respective jurisdictions of minimum wages for women and minors [16] while by an act passed June 6 of the same year Congress gave its consent in general terms to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their criminal laws and policies [17] Subsequently Congress has authorized on varying conditions compacts touching the production of tobacco the conservation of natural gas the regulation of fishing in inland waters the furtherance of flood and pollution control and other matters [18] Moreover since 1935 at least thirty six States beginning with New Jersey have set up permanent commissions for interstate cooperation which have led to the formation of a Council of State Governments (Cosgo for short) the creation of special commissions for the study of the crime problem the problem of highway safety the trailer problem problems created by social security legislation etc and the framing of uniform State legislation for dealing with some of these

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The question arises whether the assent of Congress is constitutionally essential to any and all agreements among two or more States Apparently Chief Justice Taney thought so in 1840 [0] but a half century later the Court indicated the opinion that such assent was not required to agreements having no tendency to increase the political powers of the States or to encroach on the just supremacy of the National Government [1] This divergence of doctrine may conceivably have interesting con equences [2]

Grants in Aid Social Security

From a comparatively early date the Nationnl Government has systematically entered into compacts with newly admitted States whereby in return for a grant of lands for educational purposes and other concessions such States have pledged themselves to refrain from taxing for a term of years lands sold by the National Government to settlers [3] And since 1911 through so called Federal Grants in Aid a quasi contractual relationship between the National Government and the States has developed on a much more extensive scale Thus Congre s has voted money to subsidize forest protection education in agricultural and industrial subjects and in home economics vocational rehabilitation and education the maintenance of nautical schools experimentation in reforestation highway construction etc in the States in return for which cooperating States have appropriated equal sums for the same purposes and have brought their further powers to the support thereof along lines laid down by Congress [24] The Social Security Act of August 14 1935 marks the culmination to date of this type of National State cooperation It brings the *national* taxing spending power to the support of such States as

[19] *In addition to references in note 15 above see* The States Put Their Heads Together *Current History* May 1938 and Jane P Clark *The Rise of a New Federalism* (New York 1938)

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desire to cooperate in the maintenance of old age pensions unemployment insurance maternal welfare work vocational rehabilitation and public health work and in financial assistance to impoverished *old age dependent* children and the blind Such legislation is as we have seen within the national taxing spending power (*see* p 29) but what of the objection that it coerces complying States into 'abdicating their powers? Speaking to this point in the *Social Security Act cases the Court* has said The contention confuses motive with coercion To hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties And again The United States and the state of Alabama are not alien governments They coexist within the same territory Unemployment is their common concern Together the two statutes before us [the Act of Congress and the Alabama Act] embody a cooperative legislative effort by State and National Governments for carrying out a public purpose common to both which neither could fully achieve without the cooperation of the other The Constitution does not prohibit such cooperation [25]

In short expansion of national power within recent years has been matched by *increased* governmental activity on the part of the States also sometimes in cooperation with each other sometimes in cooperation with the National Government sometimes in cooperation with both

In entering upon a compact to which Congress has given its consent a State accepts obligations of a legal character which the Court and/or Congress possess ample powers to enforce [26] Nor will it avail a State to endeavor to read itself out of its obligations by pleading that it had no constitutional power to enter upon such an arrangement and has none to fulfill its duties thereunder [7]

[25] Stewart Mach Co v Davis 301 U S 548 (1937) Carmichael v So Coal and Coke Co 301 U S 495 526 (1937)
[26] 246 U S 565 (1918)
[7] West Virginia v Sims 341 U S 22 (1951)

ARTICLE II

This article makes provision for the executive power of the United States which it vests in a single individual the President

SECTION 1

¶ 1 The executive power shall be vested in a President of the United States of America He shall hold his office during the term of four years and together with the Vice President chosen for the same term be elected as follows

Executive Power

What precisely does the opening clause of this paragraph do? Does it confer on the President his power or merely his title? If the former then the remaining provisions of this article exist only to emphasize or to qualify the executive power as for instance where they provide for the participation of the Senate in the appointing and treaty making powers If the latter then the President has only such powers as are conferred on him in more specific terms by these same remaining provisions

The question is one which has been debated from the adoption of the Constitution The first occasion was in 1789 when Congress in the absence of a specific constitutional provision regarding the power of removal conceded the power in the case of the heads of the executive departments to the President alone[1] Then in 1793 Hamilton and Madison renewed the debate with reference to Washington s Neutrality Proclamation of that year No provision either of the Constitution or of an act of Congress gave the President the power to issue such a proclamation but Hamilton defended it nevertheless as within the executive power' while Madison reversing his position in the debate of four years earlier urged the opposed view[2]

Today the honors of war rest distinctly with the power theory of the clause Especially is this so when one

[1] The Present writer s *The President s Removal Power* 10-23 (National Municipal League New York 1927)
[2] *The President Office and Powers* (4th Ed) 179 181

consults the views and practices of recent incumbents of the Presidency The first Roosevelt classified all Presidents as of either the Buchanan or the Lincoln type Mr Taft was a Buchanan President sticking as close as bark to a tree to the letter of the Constitution and the statutes in interpreting his powers T R on the other hand was the Linclon type taking the position that the President was a steward of the people and as such entrusted with the duty of doing anything that the needs of the Nation demanded unless such action was forbidden by the Constitution and the laws [3] Although in his book on the Presidency *Professor* Taft denounced this view as making the President 'a universal Providence [4] *Chief Justice* Taft in his opinion for the Court in the Oregon Postmaster case supplied the constitutional basis for it when he invoked the opening clause of Article II [5] For the second Roosevelt s conception of his powers *one turns not to the stewardship theory but the* Stuart theory which is summed up by John Locke in his second *Treatise on Civil Government* in his description of Prerogative as the power to act according to discretion for the public good without the prescription of the law and sometimes even against it [6] Mr Roosevelt s incumbency was marked by a succession of emergencies and in meeting them he did not always keep to the path of constitutional or legal prescription In handing over to Great Britain in the late summer of 1940 fifty reconditioned naval craft the President violated several statutes and appropriated to himself temporarily Congress s power to dispose of property of the United States (*see* Article IV Section III) [7] Yet that this was done with the general approval of the American people there can be no reasonable doubt thus confirming Locke s further remark that the people are very seldom or never scrupulous or nice in the point of questioning the prerogative whilst it is in any tolerable degree employed for the use it was meant—that is the

[3] *Autobiography* 388 389 (New York 1913)
[4] *Our Chief Magistrate and His Powers* 144 (Columbia University Press 1916)
[5] Myers *v* U S 272 U S 52 (1926) [6] *Treatise* ch xiv
[7] *See* the Present writer in the *New York Times* of October 13 1940

good of the people and not manifestly against it It is true that the Court s decision in the recent Steel Seizure case has been interpreted by some as marking a definite setback for strong theories of Presidential power but this diagnosis hardly survives examination of the opinions of the Justices accompanying the case (*See* pp 127 128 below)

The President s Term

The President s term of four years prior to the adoption of the Twentieth Norris Lame Duck ' Amendment be gan on March 4 of the year following each leap year This happened for two reasons In the fist place the old Con gress of the Confederation set the first Wednesday in March 1789 which chanced to be March 4 as the date on which the Constitution should go into effect Actually Washing ton did not take the oath of office until April 30 of that year Nevertheless disregarding this fact the first Congress by an act which Washington himself approved on March 1 1792 provided that the term of four years for which a President and Vice President shall be elected shall in all cases commence on the fourth day of March next succeed ing the day on which the votes of the election shall have been given Thus Washington s first term was in effect if not technically shortened by act of Congress nearly two months while that of the late President Roosevelt was simi larly curtailed by the going into effect of the Twentieth Amendment

Although the original Constitution made no provision regarding the re election of a President there can be no doubt that the prevailing sentiment of the Philadelphia Convention favored his indefinite reeligibility It was Jef ferson who raised the objection that indefinite eligibility would in fact be for life and degenerate into an inheritance Prior to 1940 the idea that no President should hold for more than two terms was generally thought to be a fixed tradition although some quibbles had been raised as to the meaning of the word term President Roosevelt s viola- tion of the tradition led to the proposal by Congress on March 24 1947 of an amendment to the Constitution to rescue the tradition by embodying it in the Constitutional

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Document. The proposal became a part of the Constitution on February 27, 1951, in consequence of its adoption by the necessary thirty-sixth State, which was Minnesota.[8]

The Electoral College ¶2. Each State shall appoint, *in such manner as the legislature thereof may direct*, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

This and the following paragraph provide for the so-called "Electoral College" or "Colleges." It was supposed that the members of these bodies would exercise their individual judgments in their choice of a President and Vice-president, but since 1796 the Electors have been no more than party dummies.

The word "appoint" in this section is used, the Court has said, "as conveying the broadest power of determination."[9] Electors have consequently been chosen, first and last, in the most diverse ways: "by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people in districts and partly by the legislature; by choice *by the legislature from candidates voted for by the people*; and in other ways."

Although Madison testified that the district system was the one contemplated by the Framers, Electors are today universally chosen by popular vote on State-wide tickets. The result is that the successful candidate may have considerably less than a majority, or even than a plurality, of the popular vote cast. Thus suppose that New York and Pennsylvania were the only two States in the Union, and that New York, with forty-five electoral votes, went Democratic by a narrow margin, while Pennsylvania, with thirty-

[8] On the anti-third-term tradition, *see The President: Office and Powers* (4th Ed.), 34-38, 331-334.
[9] McPherson *v.* Blacker, 146 U.S. 1, 27-29 (1892).

eight electoral votes and with a somewhat smaller population than New York went overwhelmingly Republican The Democratic candidate would be elected although the Republican candidate would have the larger popular vote

Minority Presidents

In fact both Lincoln in 1860 and Wilson in 1912 while carrying much less than a majority of the popular vote in the country at large had sweeping majorities in the Electoral College This was because the defeated party was split in those particular elections Should however a strong third party arise which drew about equally from the two old line parties the probable result would be to throw successive elections into the House of Representatives where the constitutional method of choice would give Nevada equal weight with New York in choosing from the persons not exceeding three having the highest votes in the College (See Amendment XII p 243 below) For this reason and some others the late Senator Norris urged an amendment to the Constitution abolishing the College and requiring that the electoral vote of each State be divided among its principal parties in proportion to their strength at the polls and early in 1949 the Senate adopted such a proposal which however was rejected by the House [10] First and last a great number of expedients have been forthcoming from various sources which have had it for their proposed object to render choice of the President more democratic [10a]

[10] S J Res 2 81st Cong 1st sess was introduced by Senator Lodge and others legislative day January 4 1949 and passed February 1 (same legislative day) reported to the House March 29 1950 rejected July 17 1950 *See* Lucius Wilmerding Jr on Reforming the Electoral System in the March 29 1949 issue of the *Political Science Quarterly* for well documented criticism of the proposal *also* 32 *Congressional Digest* Nos 8 9 (August September 1953)

[10a] In fact there is now pending in the Senate Committee on the Judiciary a Joint Resolution having this object in view The essence of the proposal is the provision that if no person voted for as President receives a majority of the whole number of Electors then from the persons having the greatest number of votes the Senate and House of Representatives assembled and voting as individual members of one body shall choose immediately by ballot the President a quorum for such purpose comprising three fourths of the total membership of the two houses and a majority of the whole number being necessary to a choice But if additional ballots are necessary the choice on the fifth ballot shall be between the two persons having the highest number of votes on the fourth ballot For others

Although the Court has characterized Electors as State officers [11] the truth of the matter is that they are not officers at all by the usual tests of office [12] They have neither tenure nor salary and having performed their single function they cease to exist as Electors This function is moreover 'a federal function [13] their capacity to perform which results from no power which was originally resident in the States but springs directly from the Constitution of the United States [14] In the face therefore of the proposition that Electors are State officers the Court has upheld the power of Congress to protect the right of all citizens who are entitled to vote to lend aid and support in any legal manner to the election of any legally qualified person as a Presidential Elector [15] and more recently its power to protect the choice of Electors from fraud or corruption If this government said the Court 'is anything more than a mere aggregation of delegated agents of other States and governments each of which is superior to the general government it must have the power to protect the elections on which its existence depends from violence and corruption If it has not this power it is left helpless before the two great natural and historical enemies of all republics open violence and insidious corruption [16] The conception of Electors as State officers is still nevertheless of some importance as was shown in the recent case of Ray v Blair [17] which is dealt with in connection with Amendment XII

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of the proposals just referred to see Corwin and Koenig *The Presidency Today* (1956) 100-113

[11] *In re* Green 134 U S 377 379 380 (1890)

[12] United States v Hartwell 6 Wall 385 393 (1868)

[13] Hawke v Smith 253 U S 221 (1920)

[14] Burroughs v U S 290 U S 534 545 (1934)

[15] *Ex parte* Yarbrough 110 U S 651 (1884)

[16] Burroughs v U S 290 U S 534 546 (1934)

[17] 343 U S 214 (1952) During World War II Congress laid claim in the act of September 16 1942 to the power in time of war to secure to every member of the armed forces the right to vote for Members of Congress and Presidential Electors notwithstanding any provisions of State law relating to the registration of qualified voters or any poll tax requirement under State law The constitutional validity of this act was open to serious question and by the act of April 1 1944 was abandoned The latter act established a War Ballot Commission which was directed to prepare an adequate number of official war Ballots, whereby the servicemen would be enabled in certain contingencies to vote for Members of Congress and

Amendment the Electors of each State meet and give their votes on the first Monday after the second Wednesday in December following the November election and the two houses meet to count the votes in the hall of the House of Representatives on the ensuing January 6 at 1 p m [18] (*See also* Article I Section IV ¶2)

¶5 No person except a natural born citizen or citizen of the United States at the time of the adoption of the Constitution shall be eligible to the office of President neither shall any person be eligible to that office who shall not have attained to the age of thirty five years and been fourteen years a resident within the United States

All Presidents since and including Martin Van Buren except his immediate successor William Henry Harrison having been born in the United States subsequently to the Declaration of Independence have been natural born citizens of the United States the earlier ones having been born subjects of the King of Great Britain The question however has been frequently mooted whether a child born abroad of American parents is a natural born citizen in the sense of this clause The answer depends upon whether the definition of citizens of the United States in section 1 of Amendment XIV is to be given an exclusive or inclusive interpretation

Does fourteen years a resident within the United States mean residence immediately preceding election to office? This question would seem to have been answered in the negative in the case of President Hoover

¶6 In case of the removal of the President from office or of his death resignation or inability to discharge the powers and duties of the said office the same shall devolve on the Vice President and the Congress may by law provide for the case of removal death resignation or inability both of the President and Vice President declaring what officer shall then act as President and such officer shall act accordingly until the disability be removed or a President shall be elected.

[18] U.S Code tit 3 §5a *See* note on pp 13-14 *ante* regarding a proposal to change the date for choosing Presidential Electors

By the Presidential Succession Act of 1886 Congress provided that in case of the disqualification of both President and Vice President the Secretary of State should act as President provided he possessed the qualifications laid down in ¶5 above if not then the Secretary of the Treasury etc. The act apparently assumed that while a member of the Cabinet acted as President he would retain his Cabinet post[19]

Presidential Succession Acts

Owing however to the urging of President Truman who argued that it was undemocratic for a Vice President who had succeeded to the Presidency to be able to name his own successor Congress has recently replaced the Act of 1886 by one putting the Speaker of the House and the President *pro tempore* of the Senate ahead of the Cabinet in the order of succession but when either of these functionaries succeeds he must resign both his post and his seat in Congress and a member of the Cabinet must in the like situation resign his Cabinet post The new act also implements Amendment XX by providing for vacancies due to failure to qualify of both a newly elected President and Vice President[20]

Congress has never provided a method for determining when a President is unable to discharge the powers and duties of his office so that the Vice President should take his place but undoubtedly it could do so One suggestion is that this function should be devolved upon the Cabinet another that it should be entrusted to the Supreme Court In the two cases in which Presidents have become disabled Garfield in 1881 and Wilson in 1919 the question was left to the President s immediate *entourage* and was determined contrary to apparent fact

[19] U.S Code tit 3 §21

[20] Public Law 199 80th Cong 1st sess By section 202 (a) of Public Law 253 of the 80th Cong. 1st sess., approved July 26 1947 that is eight days after Public Law 199 the "Secretary of War and the Secretary of the Navy were stricken from the line of succession and the "Secretary of Defense" whose office Public Law 253 created was inserted instead For many other proposals touching the same subject some of them quite curious *see Digest of Public General Bills* of the 79th Congress both sessions (Library of Congress 1946)

I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States and will to the best of my ability preserve protect and defend the Constitution of the United States

The President's Oath of office

What is the time relationship between a President's assumption of office and his taking the oath? Apparently the former comes first This answer seemed to be required by the language of the clause itself and is further supported by the fact that while the act of March 1 1792 assumes that Washington became President March 4 1789 he did not take the oath till April 30 Also in the parallel case of the coronation oath of the British monarch its taking has been at times postponed for years after the heir's succession

The fact that the President takes an oath to preserve and protect the Constitution does not authorize him to exceed his own powers under the Constitution on the pretext of preserving and protecting it The President may veto a bill on the ground that in his opinion it violates the Constitution but if the bill is passed over his veto he must by the great weight of authority ordinarily regard it as law until it is set aside by judicial decision since the power of interpreting the law except as it is delegated by the law itself is not an attribute of executive power [3]

It may be nevertheless that in an extreme case the President would be morally justified in defying an act of Congress which he regarded as depriving him of his constitutional powers until there could be an appeal to the courts or to the people and in point of fact such defiances have in a few instances occurred [4]

[3] For an illustration of Presidential interpretation of the Constitution which did not come off *see* the final draft of Jefferson's message to Congress of December 8 1801 A J Beveridge *Life of John Marshall* III 605 605 (Boston 1919) The supposition that Jackson asserted a right not to carry out a court decision when acting in an executive capacity is denied by Mr Charles Warren in his *Supreme Court in United States History* II 222 224 *see also ibid* 205*ff*

[4] See the speeches of Curtis Groesbeck and Stanbery in President Johnson's behalf *Trial of Andrew Johnson* etc I 377 II 189 and 359 (Washington 1868) also *The President Office and Powers* (3rd Ed.) 222 223

SECTION II

¶1 The President shall be Commander in Chief of the Army and Navy of the United States and of the militia of the several States when called into the actual service of the United States he may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices and he shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment

The purely military aspects of the Commander in Chiefship were those which were originally stressed Hamilton said the office would amount to nothing more than the supreme command and direction of the military and naval forces as first general and admiral of the confederacy [1] Story wrote to the same effect in his *Commentaries* [2] and in 1850 the Court speaking by Chief Justice Taney asserted His [the President s] duty and power are purely military [3]

Commander in Chief in Wartime Lincoln and F D R

The modern expanded conception of the power of Commander in Chief in wartime stems in the first instance from Lincoln who brought the clause to the support of his duty to take care that the laws be faithfully executed in proceeding against an insurrection which he treated as public war Claiming on these premises the War Power he declared following the attack on Fort Sumter in April 1861 a blockade of Southern ports raised a large force of volunteers increased the Army and Navy took over the railroad between Washington and Baltimore and declared a suspension of the writ of *habeas corpus* along the line eventually as far as Boston In 1862 he established a temporary draft and suspended the writ of *habeas corpus* in the case of persons suspected of disloyal practices At the outset of 1863 he issued the Emancipation Proclamation [4]

[1] *The Federalist* No 69
[2] *Op cit* §1492 [3] Fleming v Page 9 How 603 615 618
[4] On Lincoln s view of his powers as Commander in Chief in wartime see J G Randall *Constitutional Problems under Lincoln* (New York

vice was not accepted by one of the parties to a dispute what then? At this point the President stepped in and brought to bear upon the recalcitrants such indirect sanctions as were available from various acts of Congress most of which were certainly not enacted with any anticipation that the powers they conferred would be utilized for such purpose Thus non-compliant workers who happened to be subject to conscription were confronted with induction into the armed forces or employers holding war contracts were ordered not to employ such workers and non compliant employers might be denied priorities or have their plants seized by the Government under legislation authorizing this to be done when necessary production lagged But in the case of Montgomery Ward which claimed to be engaged not in production but in distribution only the applicability of the legislation just referred to was challenged by a non compliant company with the result of raising the question whether the President as Commander in Chief in wartime was vested by the Constitution itself with the power to make such a seizure That a military commander has the right to requisition private property to meet an impelling military necessity subject to the requirement that the property be paid for in due course is well established but the taking over of the Ward properties clearly fell outside the precedents It has to be acknowledged however that just as the permeation of the North with disloyal opinions and activities during the Civil War made it difficult to set definite boundaries to the theater of military operations so do the facts of Total War which is as much of an industrial operation as it is a military one make it difficult to maintain a hard and fast line between civilian and military activities and between the governmental powers which are respectively applicable to each Total War has completely destroyed International Law so far as it formerly attempted to set limits to methods of warfare Its effect on Constitutional Limitations could be equally disastrous[8]

[8] On the above paragraph *see* Judge Sullivan s informative opinion dismissing the Government s petition for an injunction and declaratoy

ligation to render just compensation [13] By the same warrant he may bring hostilities to a conclusion by arranging an armistice stipulating conditions which may determine to a great extent the ensuing peace [14] He may not however effect a permanent acquisition of territory [15] though he may govern recently acquired territory until Congress sets up a more permanent regime [16] He is the ultimate tribunal for the enforcement of the rules and regulations which Congress adopts for the government of the forces and which are enforced through courts martial [17] Indeed until 1830 courts martial were convened solely on his authority as Commander in Chief [18] Such rules and regulations are moreover it would seem subject in wartime to his amendment at discretion [19] Similarly the power of Congress to make rules for the government and regulation of the law and navel forces (Art I §8 cl 14) did not prevent President Linclon from promulgating in April 1863 a code of rules to govern the conduct in the field of the armies of the United States which was prepared at his instance by a commission headed by Francis Lieber and which later became the basis of all similar codifications both here and abroad [20] All of which notwithstanding the Commander in Chief remains in the contemplation of the Constitution a civilian official [20a]

[13] Mitchell v Harmony 13 How 115 (1852) United States v Russell 18 Wall 623 (1871) Totten v U S note 11 above 40 Op Atty Gen 251 253 (1942)

[14] *Cf* the Protocol of August 12 1898 which largely foreshadowed the Peace of Paris *and* President Wilson s Fourteen Points which were incorporated in the Armistice of November 11 1918

[15] Fleming v Page 9 How 603 615 (1850)

[16] Santiago v Nogueras 214 U S 260 (1909) As to temporarily occupied territory *see* Dooley v U S 182 U S 222 230 231 (1901)

[17] Swaim v U S 165 U S 553 (1897) and cases there reviewed *See also* Givens v Zerbst 255 U S 11 (1921)

[18] On the President s authority over courts martial and military commissions *see* Clinton Rossiter *The Supreme Court and the Commander in Chief* (Cornell University Press 1951) 102 120 *also* Burns v Wilson 346 U S 137 (1953)

[19] *Ex parte* Quirin 317 U S 1 28 29 (1942)

[20] General Orders No 100 *Official Records* War *of Rebellion* ser III vol III April 24 1863

[20a] Interesting in this connection is the holding of the Surrogate s Court of Dutchess County New York that the estate of Franklin D Roosevelt was not entitled to certain tax benefits which are extended by statute to

One important power he lacks that of choosing his subordinates whose grades and qualifications are determined by Congress and whose appointment is ordinarily made by and with the advice and consent of the Senate though undoubtedly Congress could if it wished vest their appointment in the President alone [1] Also the President s power to dismiss an officer from the service once unlimited is today confined by statute in time of peace to dismissal in pursuance of the sentence of a general court martial or in mitigation thereof [2] But the provision is not regarded by the Court as preventing the President from displacing an officer of the Army or Navy by appointing with the advice and consent of the Senate another person in his place [23] The President s power of dismissal in time of war Congress has never attempted to limit

The principal officers of the executive departments have since Washington s day composed the President s Cabinet a body utterly unknown to the Constitution They are customarily of the President s own party and loyalty to the President is usually an indispensable qualification which however has been at times exhibited in very curious ways and of course such loyalty may not be carried to the extent of violating the law [24]

The President s Cabinet

It has been frequently suggested twice indeed by committees of Congress that the members of the Cabinet should be given seats on the floors of Congress and permitted to speak there [25] There is obviously nothing in the Constitution which stands in the way of this being done at any time

Nor for that matter is there anything to prevent the

persons dying in the military service of the United States *New York Times* July 26 1950 p 27

[21] *See e g* Mimmack v U S 97 U S 426 437 (1878) United States v Corson 114 U S 619 (1885)

[22] 10 U S Code §1590

[23] Mullan v U S 140 U S 240 (1891) Wallace v U S 257 U S 541 (1922)

[24] *See* generally Mary L. Hinsdale *History of the President s Cabinet* (Ann Arbor 1911) *and* H nry B Learned *The President s Cabinet* (New Haven 1912)

[25] Hinsdale 302 301 House Report 43 38th Cong. 1st Sess n Senate Report 873 46 Cong 3rd Sess n

President from making his Cabinet up out of the chairmen of the principal committees of the House of Representatives or the Senate for a Cabinet post is not *as such* a ' civil office under the authority of the United States nor does a member of the Cabinet *as such* 'hold any office under the United States (*See* p 20) Such a step might eventually bad to something akin to the British system of Cabinet government

The Pardoning Power

A reprieve suspends the penalties of the law a pardon remits them

'Offenses against the United States are offenses against the national laws not State laws The term also includes acts of so called criminal contempt in defiance of the national courts or their processes[26]

Pardons may be absolute or conditional and may be conferred upon specific individuals or upon classes of offenders as by amnesty

It was formerly supposed that a special pardon to be effective must be accepted by the person to whom it was proffered[27] In 1927 however in sustaining the right of the President to commute a sentence of death to one of *life imprisonment against the professed will of the prisoner* the Court abandoned this view A pardon in our days it said is not a private act of grace from an individual happening to possess power It is a part of the constitutional scheme When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed[28]

Pardons may issue at any time after the offense pardoned has been actually committed but not before then for that would be to give the President a power to set the laws aside that is a dispensing power[29] for asserting the life of which James II lost his throne

[26] *Exparte* Grossman 267 U S 87 (1925)

[27] United States v Wilson 7 Pet 150 (1833) Burdick v U S 236 U S 79 (1915)

[28] Biddle v Perovich 274 U S 480 486 (1927)

[29] 1 Opins A G 342 (1820) United States v Wilson cited above *Ex parte* Garland 4 Wall 333 (1866) United States v Klein 13 Wall 128 (1872)

It is sometimes said that a pardon "blots out of existence the guilt of the offender," but such a view, although applicable in the case of one who was pardoned *before* conviction, is extreme as to one whose offense was established by due process of law. A pardon cannot qualify such a man for a post of trust from which those convicted of crime are by law excluded. In such case the pardoned man is in precisely the same situation as a man who has served his sentence. The law will punish him no further for his past offense, but neither will it ignore altogether the fact that he committed it.[30] But a pardon is efficacious to restore a convicted person's civil rights even when completion of his sentence would not have been.

Congressional Amnesties

Although Congress may not interfere with the President's exercise of the pardoning power, it may itself under the necessary and proper clause enact amnesty laws remitting penalties incurred under the national statutes.[31]

The Treaty Making Power

¶2 *Clause* 1. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur;

It is usual to regard the process of treaty making as falling into two parts, negotiation and ratification, and to assign the former to the President exclusively and the latter exclusively to the Senate. In fact, it will be observed, the Constitution makes no such division of the subject, but the President and the Senate are associated throughout the entire process of making treaties. Originally, indeed, Washington tried to take counsel with the Senate even regarding the negotiation of treaties, but he early abandoned this method of procedure as unsatisfactory.[1] Thus what was intended to be *one* authority consisting of two closely collaborating organs became split into *two*, usually rival and often antagonistic, authorities performing sharply differentiated functions. In Consequence, in 1816 the Senate created the Committee on Foreign Relations as a

[30] *See* Samuel Williston, "Does a Pardon Blot Out Guilt?" 28 *Harvard Law Review* 647, 663 (1915); *also* Carlesi *v.* New York, 233 U.S. 51 (1914).
[31] Brown *v.* Walker, 161 U.S. 591 (1896).
[1] *The President: Office and Powers* (4th Ed.) 255-257.

standing committee and through this medium most Presidents have managed to keep more or less in touch with Senatorial sentiment regarding pending negotiations but not always with the result of conciliating it[33] Today the actual initiation and negotiation of treaties is by the vast weight of both practice and opinion the President s alone[34]

Moreover ratification also belongs to the President alone only he may not ratify a treaty with the result of *making* it, unless the Senate by a two thirds vote of the members present there being at least a quorum advises such ratification and consents to it[34a] And since the Senate may or may not consent it may consent conditionally stating its conditions in the form of amendments to the proposed treaty or of reservations to the proposed act of ratification the difference between the two being that whereas amendments if accepted by the President and the other party or parties to the treaty change it for all parties reservations merely limit the obligations of the United States thereunder Amendments are accordingly resorted to in the case of bilateral treaties and reservations in the case of general international treaties like the Hague Conventions or the United Nations Charter

Of course if the President is dissatisfied with the conditions laid down by the Senate to ratification he may refuse to proceed further with the matter as may also the other party or parties to the proposed treaty[35] Between 1789

[33] Ralston Hayden *The Senate and Treaties 1789 1817 passim* (New York 1920) Samuel B Crandall *Treaties Their Making and Enforcement* ch vi (Washington 1916) the present writer s *The Constitution and World Organization* ch III (Princeton University Press 1944)

[34] United States v Curtiss-Wright Corp 304 319 1936)

[34a] The Statement that consent of the Senate must be given by a two thirds vote of a *quorum of the Senate* has apparently not always been true To my inquiry on this matter my friend Senator H Alexander Smith of New Jersey a member of the Foreign Relations Committee wrote me August 14 1957 as follows Replying to your letter of August 11th with regard to the making of treaties—a few years ago we were very lax in this matter and treaties were frequently ratified by voice vote We adopted the rule then however that there must be a full quorum present and two-thirds of the Senators present must concur This means two third of a quorum of course Under the present practice we have a quorum call first and then a roll call vote with the vote announced and a statement from the chair that two-thirds of a quorum being present and having voted etc the treaty is agreed to

[35] Obviously the treaty must contain the whole contract between the

and 1929 about 900 treaties were proclaimed by the President Another 200 were either rejected by the Senate or so tampered with by it that either the President or the other contracting party declined to go on with them[36]

The Scope of the Power

The power to make treaties is bestowed upon the United States in general terms and extends to all proper subjects of negotiation between nations It should be noted however that a treaty to which the United States is party is not only an international compact but also law of the land in which latter respect it may not override the higher law of the Constitution Therefore it may not change the character of the government which is established by the Constitution nor require an organ of that government to relinquish its constitutional powers[36a]

How broad the scope of the treaty making power is is well illustrated by the treaty of 1916 between the United States and Canada providing for the reciprocal protection of migratory birds which make seasonal flights from the one country to the other Congress passed a law putting this treaty into effect and authorizing the Secretary of Agriculture to draw up regulations to govern the hunting of such birds any violation of these regulations to be subject to certain penalties and in the case of Missouri v Holland[37] the treaty and the law were sustained by the Supreme Court the latter as a law necessary and proper to put the treaty into effect

The Supremacy of Treaties over States Rights

Recently Missouri v Holland has been vehemently as

parties and the power of the Senate is limited to a ratification of such terms as have already been agreed upon between the President acting for the United States and the commissioners of the other contracting power The Senate has no right to ratify the treaty and introduce new terms into it which shall be obligatory upon the other power although it may refuse its ratification or make such ratifications conditional upon the adoption of amendments to the treaty Fourteen Diamond Rings v U S 183 U S 176 183 (1901)

[36] The Foreign Policy Association s *Information Service* IV no 16 (October 12 1928) gives a list of treaties amended by the Senate both those afterwards ratified and those not ratified

[36a] *See* e g Geofroy v Riggs 133 U S 258 267 (1890) Doe v Braden 16 How 635 657 (1853) The Cherokee Tobacco 11 Wall 616 620-621 (1870) United States v Minn 270 U S 181 207 208 (1926)

[37] 252 U S 416 (1920)

sailed as putting the treaty making power beyond all constitutional metes and bounds but more especially as invading States Right and it has been proposed that the necessary and proper clause be repealed as an adjunct of the power Actually Justice Holmes opinion for the Court does not bear out the more sweeping charge It is true that at one point the Justice indulged in some speculation as to whether authority of the United States means more than the formal acts prescribed to make the convention but he straightway added We do not mean that there are no qualifications to the treaty making power and pointed out that the convention before the Court did not contravene any directly prohibitory words of the Constitution also that it dealt with a national interest of very nearly the first magnitude and one that could be protected only by national action in concert with that of another power [31] In short it was made *bone fide* and not for the purpose of aggrandizing the powers of the National Government

On the other hand the argument that the treaty impaired States Rights the Justice disparaged and quite warrantably in view of the unambiguous terms of the supremacy clause In this respect indeed the case only confirmed familiar doctrine and practice Thus from the time of the Jay Treaty (1794) down to the present the National Government has entered into many treaties extending to the national of other governments the right to inherit hold and dispose of real property in the States although the tenure of such property and its modes of disposition were conceded to be otherwise within the exclusive jurisdiction of the States [32] Missouri v Holland simply follow the pattern of these precedents

In other words it is proposed to strip the treaty making power of the right to enter into conventions of a kind which have heretofore furnished the ordinary grist of the treaty making power—conventions extending to the na

[31] *Id* 433-435

[32] *See* McCormick v Sullivant 10 Wheat 192 202 (1825) United States v Fox 94 U.S. 315 320 (1876) *cf* Hauenstein v Lynham 100 U.S 483 (1879)

tionals of other countries the right to engage in certain businesses in the States to hold property there to enjoy access to the courts thereof on terms of equality with American citizens and so on all in return for like concessions to our nationals residing abroad More than that however it is proposed that that whole area of power which today rests in the cases on the mutual support that the treaty making power and the power of Congress under the necessary and proper clause lend one another shall be expunged from the map of national power Thus the right of Congress to accord judicial powers to foreign consuls in the United States[40] would become at least doubtful so also would its right to confer judicial powers upon American consuls abroad[41] its right to provide for the extradition of fugitives from justice[4] its right to penalize acts of violence within a State against aliens[43] and so on and so forth[44] The treaty making power would be demoted from the rank of a substantive power of the United States to that of a mere auxiliary power to the other delegated powers

How Treaties Are Enforced

How is a treaty enforced? Being law of the land the provisions of a treaty may if they do not intrude upon Congress s domain and it was the design of the treaty making body to put them into effect without reference to Congress be enforced in court like any other law when private claims are based upon them and by the President when the other contracting sovereignty bases a claim upon them An example of the former case would be where an alien claimed the right to own land in the United States or to engage in business under a provision of a treaty of the kind above mentioned between the United States and his home country[4] An instance of the latter would be a request by a party to the consultative pact which issued from the Inter American Conference for Peace at Buenos Aires in December 1936

[40] 4 Stats 359 10 Stat 614 [41] *In re* Ross 140 U S 453 (1891)
[4] 18 USCA paragraphs 3181 3195
[43] Baldwin *v* Franks 120 U S 578 683 (1887)
[44] *See* Neely *v* Henkel 180 U S 109 121 (1901)
[45] Hauenstein *v* Lynham 100 U S 483 (1879) Jordan *v* Tashiro 278 U S 123 (1928) Nielson *v* Johnson 279 U S 47 (1929)

for a further conference regarding inter American relations To agree to such a conference would be well within the President s diplomatic powers

The Power of Congress over Treaties

But it frequently happens that treaty provisions contemplate supplementary action by Congress as did the treaty with Canada above referred to and this is necessarily the case where money is needed to carry a treaty into effect (*see* Article I Section IX ¶7) Does however the same rule apply generally in the case of treaty provisions the enforcement of which involves executive and/or judicial action in the area of Congress s enumerated powers its power for instance to declare war its power to regulate foreign commerce etc ? While there are a few judicial *dicta* which assert that the maxim *leges posteriores priores contrarias abrogant* (later laws repeal earlier contradictory ones) operates reciprocally as between treaties and acts of Congress and hence carry the implication that the treaty making power is capable of imparting to its engagements the quality of law of the land enforceable by the courts within the area of Congress s powers yet only in one instance has a treaty provision ever been found to effect such a repeal [46] Moreover the trend of practice has been from an early date toward an affirmative answer to the above question a development which is registered in the United Nations Participation Act of 1945 By this measures the steps to be taken to fulfil our egagements under the United Nations Charter in the matter of furnishing armed forces for use at the behest of the Security Council were all to be subject to the approval of Congress [47] The frustration of this mode of procedure by the circumstances of our involvement in Korea since 1950 is dealt with later

It is also by act o Congress that officers and employees of the United Nations have been accorded various diplo

[46] *See* e g Whitney v Robertson 124 U S 190 (1888) United States v Lee Yen Tai 185 U S 213 (1902) Pigeon River Improvement etc Co v Cox 291 U S 138 (1934) *and* Cook v U S 288 U S 102 (1933)—which is the exceptional and exceptionable—holding

[47] 79th Cong Ist Sess Publi Law 264 and *See* generally Crandall s *Treaties* etc chs XII and XIII and Senate Documents 56th Cong 2nd Sess VII 25 (Document No 231)

in Chief[50] As early as 1792 Congress authorized the Post master General to enter into postal conventions as re cently as 1934 it authorized the President to enter into foreign trade agreements and to lower customs rates as much as fifty per cent on imports from the other contract ing countries in return for equivalent concessions an au thorization which it renewed in 1937 1940 and 1943 Sim ilarly the Lend Lease Act of March 11 1941 was the foun tainhead of the numerous agreements with our allies and associates in World War II under which our government first and last furnished them more than forty billions worth of munitions of war and other supplies Nor is the validity of such agreements and compacts today open to serious question in view of repeated decisions of the Court[51]

Executive Agreements Pure and Simple

Instances of treaty making by the President without the aid or consent of either Congress or the Senate are still more numerous One was the exchange of notes in 1817 between the British Minister Bagot and Secretary of State Rush for the limitation of naval forces on the Great Lakes Not till a year later was it submitted to the Senate which promptly ratified it Of like character was the protocol of August 12 1898 between the United States and Spain, by which the latter agreed to relinquish all title to Cuba and to cede Puerto Rico and her other West Indian possessions to the United States the exchange of notes between the State Department and various European governments in 1899 and 1900 with reference to the Open Door in Chi na the exchange in 1908 of so called identic notes with Japan concerning the maintenance of the integrity of Chi na the Gentlemen s Agreement first drawn in 1907 by

[50] *See The President Office and Powers* (4th Ed) 259 264 Wallace Mc Clure *International Executive Agreements* (Columbia University New York 1941) Myres S McDougal and Asher Lans Treaties and Congres sional Executive or Presidential Agreements Interchangeable Instruments of National Policy reprinted from 54 *Yale Law Journal* Nos 2 and 3 (1945) *and* the article by David M Levitan in 35 *Illinois Law Review* (December 1940) 365*ff* Between 1789 and 1929 over 1 200 agreements were consummated with foreign governments without the participation of the Senate and between 1929 and 1939 more than another hundred

[51] The leading cases are Field v Clark 143 U S 649 (1892) and Hamp ton Jr & Co v U S 272 U S 494 (1928) For Lend Lease *see* U S Code (1940) Supp IV tit 22 §§411-413

which Japanese immigration to this country was long regulated; the *modus vivendi* by which, after the termination of the Treaty of Washington in 1885, American fishing rights off the coast of Canada and Newfoundland were defined for more than a quarter of a century; the protocol for ending the Boxer Rebellion in 1901; the notorious Lansing-Ishii agreement of November 2, 1917, recognizing Japan to have "special rights" in China; the armistice of November 11, 1918—to say nothing of the entire complexus of conventions and understandings by which our relations with our "Associates" in World War I and our "Allies" in World War II were determined, of the latter of which those labelled "Yalta" and "Potsdam" have come to achieve special notoriety.

Presidential and Congressional Inroads on the Treaty Power

Obviously the line between such agreements and treaties which have to be submitted to the Senate for its approval is not an easily definable one. So when the Senate refused in 1905 to ratify a treaty which the first Roosevelt had entered into with the government of Santo Domingo for putting its customs houses under United States control, the President simply changed the "treaty" into an "agreement," and proceeded to carry out its terms, with the result that a year or so later the Senate capitulated and ratified the agreement, thereby converting it once more into a treaty. Furthermore, by recent decisions of the Supreme Court an executive agreement within the power of the President to make is law of the land which the courts must give effect to any State law or judicial policy to the contrary notwithstanding.[42] This, undoubtedly, is going rather far. It would be more accordant with American ideas of government by law to require, before a purely executive agreement be applied in the field of private rights, that it be supplemented by a sanctioning act of Congress. And that Congress, which can repeal any treaty as "law of the land or authorization," can do the same to executive agreements would seem to be obvious.

Nor is the "executive agreement," whether made with

[42] United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1942).

or without the sanction of Congress, the only inroad which practice under the Constitution has made upon the original role of the Senate in treaty making Not only as was pointed out above is the business of negotiation today within the President s exclusive province but Congress has come into possession of a quite indefinite power to legislate with respect to external affairs The annexation of Texas in 1845 by joint resolution is the leading precedent The example thus set was followed a half century later in the case of Hawaii and of similar import are the Joint Resolution of July 2 1921 by which war with the Central Powers was brought to a close and the Joint Resolution of June 19 1934 by which the President was enabled to accept membership for the United States in the International Labor Organization [53] Such precedents make it difficult to state any limit to the power of the President and Congress acting jointly to implement effectively any foreign policy upon which they agree no matter how the recalcitrant third plus one man of the Senate may feel about the matter

The National Executive Establishment

¶2 *Clause* 2 And he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors other public ministers and consuls judges of the Supreme court and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law

Except the President and the Vice President all civil officers of the United States are appointive and fall into two classes the so called Presidential officers and inferior officers

The steps of appointment in the first class are first their nomination by the President secondly their appointment by and with the advice and consent of the Senate the latter of which may not be as in the case of treaties qualified by conditions [54] thirdly their commissioning which is also by the President[55] (*see* Section III)

[53] 42 Stat 105 49 Stat 2741

[54] 3 Opins A G 188 (1837) 2 Story *Commentaries* §1531 9 *Writings of James Madison* (Hunt Ed) 111 113

[55] Marbury *v* Madison 1 Cr 137 (1803)

The offices of ambassador public minister and 'consul being recognized by the Law of Nations it was at first thought that the President might nominate to them as occasion arose in our intercourse with foreign nations but since 1855 Congress has asserted its right to restrict such appointments which it is able to do through its control of the purse

Besides ambassadors and 'public ministers there has sprung up in the course of time a class of personal agents of the President in whose appointment the Senate does not participate Theoretically these do not usually have diplomatic quality but if their identity is known they will be ordinarily accorded it in the countries to which they are sent [56]

Th War Agencies

Shall be established by law All civil offices of the United States except those of President Vice President Ambassadors Public ministers and Consuls and possibly of Justices of the Supreme Court are supposed to be the creations of Congress The great majority however of the alphabetical agencies like WPB WLB WMC ODT and so on through which World War II was conducted on the home front were created by the President as ramifications of the OEM (Office of Emergency Management) also his creation but most of them eventually received Congress s blessing and approval in the shape of appropriations or in legislation augmenting or regulating their powers OPA (successor to Presidentially created OPACS) was brought into existence by Congress

When Congress create offices it does so by virtue of its powers under the necessary and proper clause and by the same authorization it may also stipulate what qualifications appointees to them shall have so long as it leaves *some* discretion to the appointing power Thus the Civil Service Act of 1883 leaves the appointing officer the right to select from *among* those who have best sustained the tests of fitne s imposed by the act [57]

[56] *The President Office and Powers* (4th Ed) 251 253
[57] U S Code tit 5 §633 (2)

Congressional Regulation of Offices and Officers

Furthermore Congress has very broad power to regulate the conduct in office especially regarding their political activities, of officers and employees of the United States By the Civil Service Act of 1883 all such persons and members of Congress as well, are forbidden to receive or solicit any contribution to be used for a political purpose[58] By the Hatch Act of 1939[59] all persons in the executive branch of the Government or any department or agency thereof except the President and Vice President and certain policy determining officers are forbidden to take an active part in political management or political campaigns although they are still permitted to express their opinions on all political subjects and candidates and by the Hatch Act of 1940[60] these regulations are extended to employees of State and local governments who are engaged in activities financed in whole or part by national funds Both acts were recently sustained the former on the ground that the conduct banned by it was reasonably deemed by Congress to interfere with the efficiency of the public service [61]

Also Congress may and usually does limit the term for which an appointment to office may be made while as to those officers who are instruments and agents only of the constitutional powers of Congress the latter may limit drastically their removability during such terms If however an officer is an agent of the President in the exercise of any of his powers—whether constitutional or statutory—such officer is for that reason removable at the will of the President[62] And all non judicial officers of the United States are subject to disciplinary removal by the President for good cause by virtue of his duty to take care that the laws be faithfully executed [63]

[58] *Ibid* tit 18 §208
[59] Act of August 2 1939 U S Code tit 18 §§61 61K
[60] Act of July 19 1940 54 Stat 767 772
[61] United Public Workers v Mitchell 330 U S 75 (1947) Oklahoma v C S Comsn *ibid* 127 (1947) *See also Ex parte* Curtis 106 U S 371 (1882) United States v Wurzbach 280 U S 396 (1930)
[62] *Cf* Myers v U S (Oregon Postmaster Case) 272 U S 52 (1926) Humphrey v U S 295 U S 602 (1935)
[63] *The President Office and Powers* (4th Ed) 102 114

On the other hand Presidents have more than once had occasion to stand in a protective relation to their subordinates assuming their defense in litigation brought against them[64] or pressing litigation in their behalf[65] refusing a call for papers from one of the Houses of Congress which might be used in their absence from the seat of government to their disadvantage[66] challenging the constitutional validity of legislation which he deemed detrimental to their interests[67] There is one matter moreover as to which he is able to spread his own official immunity to them The courts may not require them to divulge confidential communications from or to the President that is communications which they choose to regard as confidential[68] Whether a Congressional committee would be similarly powerless is an interesting question which has not been adjudicated[69] Thus far such issues between the two departments have been adjusted politically

The Power of the President to Protect Subordinates

¶2 *Clause 3* But the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone in the courts of law or in the heads of departments

Inferior Officers

Inferior officers are evidently officers subordinate to the heads of departments or the courts of law but many classes of such officers are still appointed by the President with the advice and consent of the Senate because Congress has never vested their appointment elsewhere

By the Oregon Postmaster case, one who is vested under

[64] 6 Opins A G 220 (1853) *In re* Neagle 135 U S 1 (1890)
[65] United States v Lovett 328 U S 303 (1946)
[66] 2 Richardson *Messages and Papers of the Presidents* 847 (January 10 1825)
[67] *See* 328 U S at 313
[68] Marbury v Madison 1 Cranch 137 144-145 (1803)
[69] A ruling by Attorney General Jackson dated April 20 1941 holds that all FBI investigative reports are confidential documents which the President is entitled in the public interest to withhold from Congressional investigating committees Early in 1944 an administrative assistant to the President refused to answer questions put to him by a Senate sub-committee but later yielded on the President s order to do so *New York Times* February 29 and March 1 5 and 10 1944 *And see* generally Charles Warren Presidential Declarations of Independence 10 *Boston University Law Review* No 1 (January 1930) *also* Attorney General Brownell s Memorandum *New York Times* May 18 1954

this clause with the power to appoint an inferior officer is at the same time vested with the power to remove him the power of removal being a part of the appointing power Finally any person who is appointed to an executive post in the National Government by an officer upon whom Congress is not authorized to confer appointing power is classified as an ' employee [70]

¶3 The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session

Happen in this connection means happen to exist otherwise if a vacancy existed on account of inaction of the Senate it would have to continue throughout the recess and in this way the work of government might be greatly impeded [71]

SECTION III

¶ He shall from time to time give to the Congress information of the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient he may on extraordinary occasions convene both houses or either of them and in case of disagreement between them with respect to the time of adjournment he may adjourn them to such time as he shall think proper he shall receive ambassadors and other public ministers he shall take care that the laws be faithfully executed and shall commission all the officers of the United States

Legislative Leadership of the President

Prior even to recent Administrations the duty conferred by the opening clause of this section had come to be at the hands of outstanding Presidents like Washington Jefferson Theodore Roosevelt and Wilson a tremendous power of legislative leadership [1] The President is not on the other hand obliged by this clause to impart information which

[70] United States v Germaine 99 U S 508 (1879)
[71] *The President Office and Powers* (4th Ed) 93 94

[1] *See* generally H C Black *The Relation of the Executive Power to Legislation* (Princeton 1919) W E Binkley *The President and Congress* (New York 1947) *The President Office and Powers* (4th Ed) ch VII

in his judgement the public interest requires should be kept secret

The President has frequently summoned Congress into what is known as special session His power to adjourn the houses has never been exercised

The power to receive ambassadors and other public ministers includes the power to dismiss them for sufficient cause and the exercise of the latter power may as in the ca e of Count Bernstorff early in 1917 result in a breach of diplomatic relations leading eventually to hostilities The same power also carries with it the power to recognise new governments or to refuse them recognition also a very im portant power somtimes as was hown by President Wil son s success in thus bringing about the downfall of Presi dent Huerta of Mexico in 1916

Finally it may be said that it is the Pr sident s power under this clause taken together with his power in con- nection with treaty making and with the appointment of the diplomatic representatives of the United States that gives him his large initiative in determining the foreign policies of the United States In the words of Jefferson al though characteristically he did not always choose to abide by their consequences the transaction of business with foreign nations is executive altogether [3] Moreover as Chief Executive the President is protector of American rights and interests abroad a capacity which has become progressively more and more difficult to demark *vis a vis* Congress s power to declare war

The President be it noted does not enforce the laws himself but sees to it that they are enforced and this is so even in the case of those laws which confer power upon the President directly rather than upon some head of de partment or bureau [4]

Presidential Powers in Law Enforcement

Because of his duty to take care that the laws be faith fully executed the President has the right to take any

[2] *See* note 69 above

[3] Opinion on the Question Whether the Senate Has the Right etc April 24 1790 Saul K Padover *The Complete Jefferson* 138 (N Y 1943)

[4] Williams v U S 1 How 200 (1843) and cases there cited

necessary measures which are not forbidden by statute to protect against impending danger those great interests which are entrusted by the Constitution to the National Government He may order a marshal to protect a Justice of the Supreme Court whose life has been threatened and his order will be treated by the courts as having the force of law [4a] He may despatch troops to points at which the free movements of the mails and of interstate commerce is being impeded by private combinations or through the Department of Justice he may turn to the courts and ask them to employ the powers which the statutes regulating their jurisdiction afford them to forbid such combinations [5] And generally from an early date he has been authorised by statute to empoly available military forces against combinations too powerful to be suppressed by the ordinary course of judicial proceedings or by the power vested in the marshals [6]

Two Kinds of Martial Law

In cases of necessity accordingly he or his subordinates at the scene of action may proclaim martial law of which two grades are today recongnized—*preventive* and *punitive* The latter which is equivalent to *military government* is not by the Milligan case [7] allowable when the civil courts are open and properly functioning nor in the presence of merely threatened invasion The necessity must be actual and present the invasion real And it was by applying this test literally that a divided Court held in 1946 that the President had had no constitutional power to institute military government in the Territory of Hawaii following the Japanese assault on Pearl Harbor or to continue it after that date [8] The Achilles heel of the decision consists in the fact that it was not rendered till after the war was over and the danger past For Total War when home front activities are only an extension of the battle front and when crippling and demoralizing attacks by air

[4a] *In re* Neagle 135 U S 1 (1890)
[5] *In re* Debs 158 U S 564 (1895) United States v U M W 330 U S 258 (1947) 80th Congress 1st Sess Public Law 101 (Taft Hartley Act)
[6] 1 Stat 264 4 4 (1795) 2 Stat 443 (1807)
[7] 4 Wall 2 (1866)
[8] Duncan v Kahanamoku and White v Steer 327 U S 304 (1946)

may be launched from bases hundreds of miles away the test set by the above quoted dictum is inadequate

Under 'preventive martial law so called because it authorizes 'preventive arrests and detentions the military acts as an adjunct of the civil authorities but not necessarily subject to their orders It may be established whenever the executive organ State or national, deems it to be necessary for the restoration of good order The concept being of judicial origin is of course for judicial application and ultimately for application by the Supreme Court in enforcement of the due process clauses[9] (*See also* Section III of this Article and Article IV Section IV)

Delegations of Legislative Power to the President

Another way in which the President s executive powers have been enlarged in recent years is by the growing practice on the part of Congress of passing law in broad, general terms which have to be supplemented by regulations drawn up by a head of department under the direction of the President Under legislation which Congress passed during World War I the following powers among others, were vested in the President to control absolutely the transportation and distribution of foodstuffs to fix prices to license importation exportation manufacture storage and distribution of the necessaries of life to operate the railroads to issue passports to control cable and telegraph lines to declare embargoes to determine priority of shipments to loan money to foreign governments to enforce Prohibition to redistribute and regroup the executive bureaus and in carrying these powers into effect the President s authorized agents put in operation a huge number of executive regulations having the force of law, and the two War Powers Acts and other legislation repeated this pattern in World War II[10]

[9] Moyer v Peabody 212 U S 78 (1909) Sterling v Constantin 287 U S 378 (1932) The Great Depression produced a perfect epidemic of declarations of martial law in some ill defined sense of the term by governors of States The records of the War Department show that in the fiscal year 1934 twenty seven States mobilized the guard for emergency duty and in the next year the number reached thirty two The occasions have often been small even trivial in compass Charles Fairman 45 *Harvard Law Review* at p 1275 (June 1942)

[10] *See* especially Yakus v U S 321 U S 414 (1944) in which the Emer

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Meantime however the Court had held that Congress in enacting the NIRA in 1933 had parted with its own powers somewhat too lavishly, and for the first time in the history of the country an act of Congress was set aside in the Hot Oil cases of 1934 [11] as violative of the maxim that the legislature may not delegate its powers Congress the Court argued, had failed to lay down sufficient standard to guide executive action and without doubt it had acted with unnecessary haste Even so subsequent decisions upholding broad delegations of power to various administrative agencies of the Government make it plain that as the sphere of national power expands and the problems confronting the National Government become more complex Congress will encounter ever lessening judicial resistance to its developing policy of leaving the details of legislative projects to be filled in by such agencies which are able to carry on constant researches in their respective fields and to adapt their measures to changing conditions with comparative ease [12]

Moreover in United States *v* Curtiss-Wright Export Corporation [13] the Court speaking by Justice Sutherland used language implying that there is virtually no constitutional limit to Congress s power to delegate to the President authority which is cognate to his own constitutional powers and especially his powers in the diplomatic field The Lend-Lease Act [14] while we were still formally at peace authorised the President for a stated period (it was afterward renewed) to manufacture or otherwise procure to the extent of available funds defense articles (i e anything judged by him to be such) and lease lend exchange or otherwise dispose of them on terms satis-

gency Price Control Act of January 30 1942 was sustained against the objection that it delegated legislative power unconstitutionally to OPA

[11] Panama Refining Co *v* Ryan 293 U S 388 (1934) *See also* Schechter Bros *v* U.S 295 U.S 495 (1935)

[12] *See* especially Justice Roberts dissenting opinion in Hood & Sons *v* U S 307 U S at p 603 (1939) Opp Cotton Mills *v* Administrator etc 312 U S 126 (1941) and the Yakus case cited above

[13] 299 U S 304 327 (1936)

[14] U S Code (1940) Supp IV tit 22, §§411-413

factory to himself to any government, if he deemed that in so doing he was aiding the defense of the United States In brief the President s duty to take care that the laws be faithfully executed becomes often a power to make the laws Furthermore as was pointed out earlier his duty also embraces the defense of American rights and interests abroad since he is *vis a vis* other governments the Chief Executive of its treaties and of International Law The function is one the discharge of which it sometimes becomes difficult to demark from the war making power of Congress Nor was this unforeseen by the Framers

Presidential War Making

Thus when it was proposed in the Federal Convention on August 17 1787 to authorize Congress to make war Madison and Gerry moved to insert declare striking out make war leaving to the Executive the power to repel sudden attacks and the motion carried [15] Early in Jefferson s first administration the question arose whether the President had the right to employ naval forces to protect American shipping against the Tripolitan pirates The President himself was so doubtful on the point that he instructed his commander that if he took any prisoners he should release them also that while he could disarm captured vessel in self defense he must release those too These scruples excited the derision of Hamilton who advanced the contention that if we were attacked we were *ipso facto* at war willy nilly and that Congress s prerogative was exclusive only when it came to putting the country into a state of war *ab initio* [16] At the time Jefferson s view prevailed Congress formally voting him war powers against the Bey of Tripoli [17] Later developments have favored Hamilton s thesis Commenting on the action of Lieutenant Hollins in 1854 in ordering the bombardment of Greytown Nicaragua in default of reparations from the local authorities for an attack by a mob on the United States consul stationed there Justice Nelson on circuit said As respects the interposition of the Executive abroad for the

[15] 2 Farrand *Records* 318 319
[16] *The President Office and Powers* (4th Ed) 242 243
[17] Act of February 6 1802

protection of the lives or property of the citizen the duty must of necessity rest in the discretion of the President under our system of government the citizen abroad is as much entitled to protection as the citizen at home [18] words which were endorsed by the Supreme Court in 1890 The President s duty said Justice Miller is not limited to the enforcement of acts of Congress or of treaties of the United States according to their express terms but includes the rights duties and obligations growing out of the Constitution itself our international relations and all the protection implied by the nature of the Government under the Constitution [19]

In his small volume on World Policing and the Constitution[20] Mr James Grafton Rogers lists 149 episodes similar to the Greytown affair stretching between the undeclared war with France in 1798 and Pearl Harbor While inviting some pruning the list demonstrates beyond peradventure the existence in the President as Chief Executive and Commander in Chief of power to judge whether a situation requires the use of available forces to protect American rights of person and property outside the United States and to take action in harmony with his decision Such employment of the forces has it is true been usually justifiable as acts of self defense rather than acts of war but the countries where they occurred were entitled to treat them as acts of war nevertheless although they have generally been too feeble to assert their prerogative in this respect and have sometimes actually chosen to turn the other cheek Thus when in 1900 President McKinley without consulting Congress contributed a sizable contingent to the joint forces that went to the relief of the foriegn

[18] Durand *v* Hollins 4 Blatch 451 454 (1860)

[19] *In re* Neag e 135 U S 1 64

[20] Published by World Peace Foundation (Boston 1945) *See also* for the period 1811 to 1934 J Reuben Clark s Memorandum as Solicitor of the Department of State entitled *Right to Protect Ci ens in Foreign Countries by Landing Forces* (Government Printing Office 1912 1934) The great majority of the landings were for the simple protection of American citizens in disturbed areas and only about a third involved belligerent action

legations in Peking the Chinese Imperial Government agreed that this action had not constituted war [1]

And Article V of the Atlantic Pact builds on such precedents The novel feature is its enlarged conception of defensible American interests abroad In the words of the published abstract of the Report of the Committee on Foreign Relations on the Pact Article 5 records what is a fact namely that an armed attack within the meaning of the treaty would in the present day world constitute an attack upon the entire community comprising the parties to the treaty including the United States Accordingly the President and the Congress each within their sphere of assigned constitutional responsibilities would be expected to take all action necessary and appropriate to protect the United States against the consequences and dangers of an armed attack committed against any party to the treaty [22] But from the very nature of things the discharge of this obligation against overt force will ordinarily rest with the President in the first instance just as has the discharge in the past of the like obligation in the protection of American rights abroad Furthermore in the discharge of this obligation the President will ordinarily be required to use force and perform acts of war Such is the verdict of history a verdict which has been currently confirmed by our intervention in Korea under the auspices of the United Nations

President and Congress and the Atlantic Pact

The aggregate of powers available to the President in the absence of controlling legislation is thefore impressive a fact which was dramatically advertised when in April 1952 President Truman in order to avert a nation wide strike of steel workers directed the Secretary of Commerce to seize and operate most of the steel mills of the country [23] The President cited no specific statutory warrant for this step but urged the requirement of national defense at home and of our allies abroad and cited gen

The Steel Seizure Case of 1952

[21] 5 Moore *International Law Digest* 478 510 *passim*
[22] A Decade of American Foreign Policy Sen Doc 123 81st Cong 1st Sess (1949) p 1347
[23] Executive Order 10340 17 Fed Reg 3139

repeatedly[29] Likewise until Congress acts, he may govern conquered territory[30] and in the absence of attempts by Congress to limit his power may set up military commissions in territory occupied by the armed forces of the United States[31] That during the Civil War Lincoln s suspensions of the writ of *habeas corpus* paved the way to authorizing legislation was pointed out above (*see* p 76) Similarly Lincoln s action in seizing the railroad and telegraph lines between Washington and Baltimore in 1861 was followed early in 1862 by an act of Congress generally authorizing such seizures when dictated by military necessity[32]

Presidential Seizures of Property

On the specific issue of seizures of industrial property Justice Frankfurter incorporates much pertinent data in an appendix to his concurring opinion[33] Of statutes authorizing such seizures he lists 18 between 1916 and 1951 and of Presidential seizures without specific statutory authorization he lists eight for the World War I period and eleven for the World War II period several of which occurred before the outbreak of hostilities In the War Labor Disputes Act of June 25 1943[34] such seizures were put on a statutory basis and in United States *v* Pewee Coal Co Inc[35] they were in implication sustained as having been validly made[36]

In consequence of the evident belief of at least four of the Justices who concurred in the judgment in Youngstown that Congress had exercised its powers in the premises of the case in opposition to seizure by the procedures which it had laid down in the Taft Hartley Act the lesson of

[29] 22 Opins A G 13 (1898) Tucker *v* Alexandroff 183 U S 424 435 (1902) An act passed May 27 1921 42 Stat 8 requires Presidential license for the landing and operation of cables connecting the United States with foreign countries Quincy Wright *The Control of American Foreign Relations* 302 fn 75 (New York 1922)

[30] Santiago *v* Nogueras 214 U S 260 (1909)

[31] Madsen *v* Kinsella 343 U S 341 (1952)

[32] 12 Stat 334

[33] 343 U S at 615 626

[34] 57 Stat 163

[35] 341 U.S 114 (1951)

[36] This is because damages were awarded in the Pewee Case implying the Court s acceptance of the idea that the seizure had been a governmental act. *See* Hooe *v* United States 218 U.S 322, 335 336 (1910) United States *v* North American Co 253 U S 330 333 (1920) *Cf* Larson *v* Domestic and Foreign Corp 337 U S 682 701 702 (1949)

the case is somewhat blurred But that the President does possess in the absence of restrictive legislation a residual or resultant power above or in consequence of his granted powers to deal with emergencies which he regards as threatening the national security is explicitly asserted by Justice Clark[37] and is evidently held with certain qualifications by Justices Frankfurter and Jackson and is the essence of the position of the dissenting Justices[38] The lesson of the case therefore if it has a lesson is that escape from Presidential autocracy today is to be sought along the legislative route rather than that of judicial review[39]

SECTION IV

¶The President Vice President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason bribery or other high crimes and misdemeanors

The Legal Responsibility of Inferior Officers

Besides their liability to the impeachment process (*see* Article I, Section III ¶s 6 and 7) the President s principal subordinates are answerable to him since as the law has stood from the beginning of the National Government except for a brief period after the Civil War, he has had a practically unrestricted power of removal but Congress may qualify this power in the case of agencies whose powers are derived solely from Congress and especially is this true as to agencies like the Interstate Commerce Commis

[37] 343 U.S at 662-663

[38] A notable feature of C J Vinson s opinion for himself and Justices Reed and Minton is a long passage extracted from the Government s brief in United States *v* Midwest Oil Co 236 U S 459 (1915) It emphasizes and illustrates the proposition that there are fields [of power] which are common to both Congress and the President] in the sense that the Executive may move within them until they shall have been occupied by legislative action 343 U S at 691 The authors of the brief were Solicitor General John W Davis and Assistant Attorney General Knaebel The former was Youngstown s principal counsel

[39] This conclusion is emphasized by the division of the Court in the recent case of Cole *v* Young 351 U S 536 (1956) which exhibits even more clearly than the opinions in Youngstown the schizophrenia that is apt to seize upon the Court when confronted with Presidential pretensions and to cloud its common sense

sion the Federal Trade Commission and so on which are often required to proceed in a semi judicial manner [1]

Furthermore all officers below the President including such independent commissions are responsible to the courts in various ways Indeed an order of the President himself not in accordance with law will be set aside by the courts if a case involving it comes before them [2] Also, while the President may not be prohibited by writ of injunction from doing a threatened illegal act, or be compelled by writ of mandamus to perform a duty definitely required by law [3] his subordinates do not share his immunity suits against them being usually brought in the United States District Court for the District of Columbia [4] Also by common law principles a subordinate executive officer is personally liable under the ordinary law for any act done in excess of authority [5] Indeed by a recent holding district courts of the United States are bound to entertain suits for damages arising out of alleged violation of plaintiff s constitutional rights even though as the law now stands the court is powerless to award damages [6] But Congress may in certain cases exonerate the officer by a so called act of indemnity [7] while as the law stands at present any officer of the United States who is charged with a crime under the laws of a State for an act done ' under the authority of the United States is entitled to have his case transferred to the national courts [8]

The extent of the President s own liability under the ordinary law while he is clothed with official authority is a matter of some doubt Impeachment aside his prin

[1] Humphrey v U S 295 U S 602 (1935)

[2] Kendall v U S 12 Pet 524 (1838) United States v Lee 106 U S 196 (1882)

[3] Mississippi v Johnson 4 Wall 475 (1866)

[4] United States v Schurz 102 U S 378 (1880) United States v Black 128 U S 40 (1888) Riverside Oil Co v Hitchcock 190 U S 316 (1903)

[5] Little v Barreme 2 Cranch 170 (1804) United States v Lee cited above Spalding v Vilas 161 U S 483 (1896)

[6] Bell v Hood 327 U S 678 (1946) The decision is based on an interpretation of U S Code tit 28 §41 (1)

[7] Mitchell v Clark 110 U S 633 (1884)

[8] Tennessee v Davis 100 U S 257 (1879) *In re* Neagle 135 U S 1 (1890) *Cf* Maryland v Soper 270 U S 9 (1926)

cipal responsibility seems to be simply his accountability as Chief Justice Marshall expressed it to his country in his political character and to his own conscience [9]

This article completes the framework of the National Government by providing for the judicial power of the United States

SECTION I

¶The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish The judges both of the Supreme and inferior courts shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office

Inherent Elements of Judicial Power

Judicial power is the power to decide 'cases and controversies in conformity with law and by the methods established by the usages and principles of law [1]

Like legislative and executive power under the Constitution judicial power too is thought to connote certain incidental or inhernt attributes One of these is the ability to interpret the standing law whether the Constitution acts of Congress or judicial precedents with an authority to which both the other departments are constitutionally obliged to defer [2] But political questions often afford an exception to this general rule [3] as also do so-called questions of fact which are often left to administrative bodies although their determination may affect the scope of the authority of such bodies very materially [4] And closely *related to this attribute of judicial power is another which*

[9] Marbury v Madison 1 Cranch 137 166 167 (1803)

[1] Prentis v Atl Coast Line Co 211 U S 210 226 (1908) *See also* Muskrat v U S 219 U S 346 361 (1911)

[2] *See e g* Federal Power Com s n v Pacific Power and L Co 307 U S 156 (1939)

[3] On political questions *See* p 140 below

[4] Interstate Com Com s n v Ill C R Co 215 U S 452 (1910) Inter

may be termed power of "finality of decision" The underlying idea is that when a court of the United States is entrusted with the determination of any question *whether* of law or of fact its decision of such question cannot constitutionally be made reviewable except by a higher *court* that is cannot be made reviewable by either of the other two departments or any agency thereof[5] Thus so long as the decisions of the Court of Claims as to amounts due claimants against the Government were subject to disallowance by the Secretary of the Treasury it was held not to be a "court" with the result that the Supreme Court could not take appeals from it[6] But the principle is not an altogether rigid one for the Court of Claims is today regarded as a true court stemming from Article III §I of the Constitution despite the fact that its judgements have to be satisfied out of sums which only Congress can appropriate[7] Also the courts of the United States are today generally required to serve as adjuncts in the work of such administrative bodies as the Interstate Commerce Commission the Federal Trade Commission the National Labor Relations Board etc by backing up the valid findings of such tribunals with orders which those to whom they are addressed must obey if they do not want to go to jail for contempt of court[8]

Which calls attention to a third inherent judicial attribute namely the power of a court to vindicate its dignity and authority in the way just mentioned This power

state Com Comsn v Union P R R Co 222 U S 541 (1912) Shields v Utah Idaho cent R Co 305 U S 177 (1938) Sunshine Anthracite Coal Co v Adkins 310 U S 381 (1940) Perkins v Lukens Steel Co 310 U S 113 (1940)

[5] For the start of this doctrine *see* Hayburn s Case decided in 1792 2 Dall 409 and especially the reporter s notes

[6] *See* Gordon v U S 117 U S appendix (1864)

[7] D Groot v U S 5 Wall 419 (1867) 67 Stat 26 (1953)

[8] The great leading case is Interstate Com Com s n v Brimson 154 U S 447 (1894) A recent decision inferentially sustains the right of Congress to confer the subpoena power upon administrative agencies Justice Murphy dissented saying he was unable to approve the use of non judicial subpoenas issued by administrative agents but his protest was based on the great growth of administrative law in the past few years and not on the ground that the subpoena power was inherently or exclusively judicial Oklahoma Press Pub Co v Walling 327 U S 186 (1946)

Contempt of Court

was defined in general terms in the Judiciary Act of 1789 and further restricted by the Act of 1831 which limited punishable contempt to disobedience to any judicial process or decree and to misbehavior in the presence of the Court or so near thereto as to obstruct the administration of justice [9] The purpose of the last clause was to get rid of a doctrine of the common law which although it has the sanction of Blackstone is otherwise of dubious authenticity that criticism reflecting on the conduct of a judge in a pending case constituted contempt because of its tendency to draw into question the impartiality of the court and to scandalize justice [10] Eighty five years later nevertheless the Supreme Court largely restored the discredited doctrine by an enlarged interpretation of the ' so near thereto clause [11] But not only was this decision overturned in 1941 [12] but the Court a little later by a vote of five Justices to four ruled that for an utterance to be held in contempt simply in reliance on the common law it must offer an extremely serious threat of causing a miscarriage of justice or of obstructing its orderly administration, otherwise the constitutional guaranty of freedom of press would be invaded [13] Another limitation on the contempt power is that it exisists for the protection of the processes of the Court and thereby of justice The judge the Court has said must banish the slightest personal impulse to reprisal but he should not bend backward and impair the authority of the Court by too great leniency [14] In Sacher v United States [15] an outgrowth of the trial of the Eleven Communists this rule was adhered to Here counsel for the defense engaged in practices designed to break down the judge and break up the trial In order not to further the latter objective Judge Harold Medina deferred calling

[9] U S Code tit 28 § 385 *ex parte* Robinson 19 Wall 505 (1874)

[10] *See* the bibliographical data in J Douglas s opinion for the Court in Nye v U S 313 U S 33 (1941)

[11] Toledo Newspaper Co v U S 247 U S 402 (1918)

[12] *See* note 10 above

[13] Bridges v Calif 314 U S 252 (1941) followed in Pennekamp v Fla 328 U S 331 (1946)

[14] Cooke v U S 267 U S 517 539 (1925)

[15] Sacher v U S 343 U.S 171 13 14 (1952) Dennis v U.S 341 U S 494 (1951)

the rioters to account until the termination of the proceedings and was sustained by the Court in so doing

Two other restraints on the contempt power are first a provision of the Clayton Act of 1914 which makes certain classes of criminal contempts triable by a jury [16] second as was mentioned earlier the President s pardoning power (*see* pp 106 107)

In contrast to certain State courts no court of the United States possesses the power in the absence of authorization by Congress to suspend the sentence of a convicted offender [17] clemency being under the Constitution an executive function

Varying Size of the Supreme Court

Also it would seem that the Supreme Court regards itself as having the inherent power to determine whether an appointment to it was constitutionally valid although such power may be invoked only by one who is able to show that he has sustained or is in danger of sustaining a direct injury as a result of the challenged appointment [18]

Although *a* Supreme Court is provided for by the Constitution the organization of the existing Court rests on an act of Congres The size of the Court is al o a matter for legislative determination at all times subject to the requirement that existing incumbents shall not be thrown out of office Originally the Court had six members today it has nine any six of whom constitute a quorum [19] At one time during the Civil War it had ten members an enlargement which was partly occasioned by the fact that the unfavorable attitude of several of the Justices toward the war was thought to endanger the Government s policies [20] Again in 1870 at the time of the decision in Hepburn v Griswold [1] setting aside the Legal Tender Act of 1862 the two vacancies then existing in the Court s membership were filled by appointees who were known to disapprove of that decision and fifteen months later the deci-

[16] U S Code tit 28 §387 Michaelson v U S 266 U S 42 (1924) *Cf* The Civil Rights Act of 1957

[17] *Ex parte* United States 242 U S 27 (1913) Holiday v Johnson 313 U S 342 (1941)

[18] *Ex parte* Albert Levitt Petitioner 302 U S 633 (1937)

[19] U S Code tit 28 §321

[20] C B Swisher *Roger B Taney* 566 (New York 1935) [21] 8 Wall 603

sion was reversed by the new majority.[22] Though possessing all the formal attributes of a judicial tribunal, the Court today exercises such vast and such undefined powers in the censorship of legislation, both national and State, and in interpretation of the former, that the social philosophies of suggested appointees to it are quite legitimately a matter of great concern to the appointing authority, the President and Senate.[23]

The "inferior courts" covered by this section comprise today ten Circuit Courts of Appeals and eighty odd District Courts with approximately 225 judges. Since they rest upon act of Congress alone, they may be abolished by Congress at any time; but whether their incumbents may be thus thrown out of office is at least debatable. When in 1802 Congress repealed an act of the previous year creating certain Circuit Courts out of the United States, it also threw their judges out of office; but the Act of 1913 abolishing the Commerce Court left its judges still judges of the United States.

The territorial courts, e.g., those of Hawaii and Alaska, do not exercise "judicial power of the United States," but a special judicial power conferred upon them by Congress by virtue of its sovereign power over these places (*see* Article IV, Section III, ¶2). Their judges accordingly have a limited tenure and are removable by the President.[24]

"Legislative Courts"

Also there are certain courts exercising jurisdiction over a limited class of cases, like the Court of Customs and Patent Appeals, which are regarded as "legislative," *not* constitutional, courts. The powers of such courts sometimes embrace non-judicial elements, but any purely judicial

[22] Sidney Ratner, "Was the Supreme Court Packed by President Grant?" in 50 *Political Science Quarterly*, 343-358; Knox *v.* Lee, 12 Wall. 457.

[23] This was well understood by the Senatorial opponents of Mr. Hughes's appointment as Chief Justice. *See New York Times*, February 12-15, 1930; *and see* the data compiled by the late Senator Robinson in his answer to Senator Borah respecting President Roosevelt's Court Proposal of February 5, 1937. *Ibid.* March 31, 1937. The avowed utilization of sociological data by the Court in the Desegregation Cases confirms Senator Robinson's argument.

[24] American Ins. Co. *v.* Canter, 1 Pet. 511 (1828), is still the leading case on the constitutional status of territorial courts.

determination by them may be made appealable if Congress wishes to the regular national courts Nevertheless since they do not participate in the judicial power of the United States within the sense of this section the tenure of their judges rests solely on act of Congress

The word diminished in this section was considered above in connection with Article II Section I ¶7

SECTION II

¶1 The judicial power shall extend to all cases in law and equity arising under this Constitution the laws of the United States and treaties made or which shall be made under their authority to all cases affecting ambassadors other public ministers and consuls to all cases of admiralty and maritime jurisdiction to controversies to which the United States shall be a party to controversies between two or more States between a State and citizens of another State between citizens of different States between citizens of the same State claiming lands under grants of different States and between a State or the citizens thereof and foreign States citizens or subjects

Categories of Cases and Controversies

The cases and controversies here enumerated fall into two categories first those jurisdiction over which depends on the character of the cause that is to say the law to be enforced second those jurisdiction over which depends entirely on the character of the parties [1] In both instances however the jurisdiction described is only *potential* except as to the *original* jurisdiction of the Supreme Court Thus the lower federal courts derive *all* their jurisdiction immediately from acts of Congress and the same is true of the Supreme Court as to its *appellate* jurisdiction Also all writs by which jurisdiction is asserted or exercised are authorized by Congress

[25] *Ex parte* Bakelite 279 U S 438 (1929)

[1] Cohens v Va 6 Wheat 264 378 (1821)

[2] Turner v Bk of No Am 4 Dall 8 (1798) Kline v Burke Constr Co 260 U S 266 (1922) Durousseau v U S 6 Cr 307 (1810) *ex parte* McCardle 7 Wall 506 (1869) *The Francis Wright* 105 U S 381 (1881) St Louis and Iron Mountain R R v Taylor 210 U S 281 (1908) *also* Robert J Harris Jr *The Judicial Power of the United States* ch II for a review of controversies on this point (Louisiana State University Press 1940)

Requirements of Same

Controversies are civil actions or suits; cases may be either civil or criminal. The connotations of these terms are otherwise substantially the same. Outstanding is the requirement of adverse litigants presenting an honest and antagonistic assertion of rights. Thus it is said to be "well settled" that "the Court will not pass upon the constitutionality of legislation . . . upon the complaint of one who fails to show that he is injured by its operation . . ." also that "litigants may challenge the constitutionality of a statute only in so far as it affects them."[3]

It would appear nevertheless that this rule has been at times "more honored in the breach than the observance." Thus in Pollock v. Farmers Loan and Trust Co.[4] the Supreme Court sustained the jurisdiction of a district court which had enjoined the company from paying an income tax even though the suit was brought by a stockholder against the company, thereby circumventing section 3224 of the Revised Statutes which forbids the maintenance in any court of a suit "for the purpose of restraining the collection of any tax."[5] And forty years later its ability to find adversity in the narrow crevices of casual disagreement was well illustrated by Carter v. Carter Coal Co.,[6] where the president of the company brought suit against the company and its officials, among whom was Carter's father, vice president of the company.[7] The Court entertained the suit and decided the case on its merits.

Of similar import is the concept of "real" or "substantial" interests. As a general rule the interest of taxpayers in the general funds of the federal Treasury is insufficient to give them a standing in court to contest the expenditure of public funds on the ground that this interest is shared

[3] Fleming v. Rhodes, 331 U.S. 100, 104 (1947). *See also* Blackmer v. U.S., 284 U.S. 421, 442 (1932); Virginian R. Co. v. System Federation, 300 U.S. 515 (1937); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 513 (1937).

[4] 157 U.S. 429 (1895). English precedents favor this sort of jurisdiction. *See* Dodge v. Woolsey, 18 How. 331 (1856).

[5] *Cf.* Cheatham *et al.* v. U.S., 92 U.S. 85 (1875), and Snyder v. Marks, 109 U.S. 189 (1883).

[6] 298 U.S. 238 (1936).

[7] Robert L. Stern, "The Commerce Clause and the National Economy," 59 *Harvard Law Review* 645, 667-668 (1948).

with millions of others is comparatively minute and indeterminable and the effect upon future taxation of any payment out of the funds so remote fluctuating and uncertain that no basis is afforded for an appeal to the preventive powers of a court of equity[8] Likewise the Court has held that the general interest of a citizen in having the government administered by law does not give him standing to contest the validity of governmental action[9] the importance of which observation also depends in the words of the immortal Sairey Gamp upon the application thereof Recent cases involving the issue of religion in the schools reach divergent results on this point[9a]

A third element of a case or controversy formerly much insisted upon is the doctrine that the party initiating it must be asking the Court for a remedy or execution This no longer represents the position of the Court and by an act passed by Congres on June 14 1934 Courts of the United States are authorized in cases of actual controversy to declare rights and other legal relations of any interested party petitioning for such declaration whether or not further relief is or could be prayed and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such[10]

Law" versus Equity

Whether a case is one in law or in equity is a mere matter of history and depends today on the kind of remedy that is asked for Criminal prosecutions and private actions for damages are cases in law since these were early decided in England in the regular law courts An application for an injunction on the other hand, was passed upon by the Lord Chancellor as a matter of grace and so is a *suit* in equity Heretofore the distinction between the two

[8] Massachusetts v Mellon 262 U S 447 487 (1923) *See also* Williams v Riley 280 U S 78 (1929)

[9] Fairchild v Hughes 258 U S 126 (1922)

[9a] *See Constitution of the United States of America Analysis and Interpretation* (Government Printing Office 1953) 764-769

[10] Fidelity Trust Co v Swope 274 U S 123 (1927) U S Code tit 28 §400 Aetna Life Ins Co v Haworth 300 U S 227 (1937) and Alabama State Federation of Labor v McAdory 325 U S 450 (1945) Edwin M Borchard *Declaratory Judgments* 249 303 (New York 1934)

kinds of cases has been maintained in the field of national jurisdiction as it is in most of the States although the same courts dispense both law and equity By the Act of June 14 1934 however the Supreme Court is empowered to merge the two procedures so as to secure one form of civil action for both in the District Courts of the United States and the Courts of the District of Columbia and it has since adopted rules for this purpose which went into effect from the final adjournment of the Seventy fifth Congress [11]

A case is one arising under this Constitution the laws of the United States and treaties of the United States when an interpretation of one or the other of these is re quired for its final decision [12] But while the judicial pow er extends to *all* such cases there is a certain category of them in which the Court does not usually claim full liberty of decision These are cases involving so called political questions the best example of which is furnished by ques tions respecting the rights or duties of the United States in relation to other nations When the political depart ments Congress and the President have passed upon such questions the Court will generally accept their determina tions as binding on itself in deciding cases [13] Of course it rests with the Supreme Court to say finally whether a ques

• Political Questions

[11] U S Code tit 28 §723 (b) and (c)
[12] Cohens v Va 6 Wheat 264 379 (1821)
[13] 3 *Willoughby on the Constitution* 1326-1329 (New York 1929) The cases fall into several categories some of which touch the problem of constit utional interpretation more directly than others (1) Those that raise the issue of what proof is required that a statute has been enacted or a constitutional amendm nt ratified (2) questions arising out of the conduct of foreign relations (3) the termination of wars or rebellions (4) the question of what constitutes a republican form of government and the right of a State to protection against invasion or domestic violence (5) questions arising out of political actions of States in determining the mode of choosing Presidential Electors State officials and Congressional reap- portionm nt (6) suits brought by Stat s to test h ir sovereign rights *See* Melville Fuller Weston Political Questions 38 *Harvard Law Rev w* 296 (1925) Some outstanding cases are Foster v Neilson 2 Pet 253 (1929) Luther v Borden 7 How 1 (1849) Georgia v Stanton 6 Wall 50 (1868) Coleman v Miller 307 U S 433 (1939) Colegrove v Green 328 U S 549 (1946) with which cf McDougall v Green 335 U S 281 (1948) South v Peters 339 U S 276 (1950) National City Bank v Republic of China, 348 U S 356 (1955)

tion is a political question in this sense (*See also* Article IV Section IV)

Judicial Review, Its Origin

Cases arising under this Constitution are cases in which the validity of an act of Congress or a treaty or of a legis lative act or constitutional provision of a State or of any official act whatsoever which purports to stem directly from the Constitution is challenged with reference to it This clause in alliance with the Supremacy Clause (Article VI par 2) furnishes the constitutional warrant for that highly distinctive feature of American Government Judicial Re view The initial source of judicial review however is much older than the Constitution and indeed of any Ameri can constitution It traces back to the common law certain principles of which were earlier deemed to be funda mental and to comprise a higher law which even Par- liament could not alter 'And it appears wrote Chief Justice Coke in 1610 in his famous dictum in Bonham s case that when an act of Parliament is against common right and reason the common law will control it and adjudge such act to be void [14] This idea first commended itself to Americans as offering an available weapon against the pretensions of Parliament in the agitation leading to the Revolution [15] Thus in 1765 the royal governor of Mas sachusetts Province wrote his government that the prevail ing argument against the Stamp Act was that it contravened Magna Charta and the natural rights of Englishmen and therefore according to Lord Coke was null and void [16] and on the eve of the Declaration of Independence Judge William Cushing later one of Washington s appointees to the original bench of the Supreme Court charged a Mas sachusetts jury to ignore certain acts of Parliament as void and inoperative and was congratulated by John Adams for doing so In fact the Cokian doctrine was invoked by the Supreme Court of the United States as late as 1874 [17]

With however the establishment of the first written

[14] 8 Reps 107 118 (1610)

[15] *See* Quincy *Early Massachusetts Reports* 469-488

[16] *Ibid* 527 [17] Loan Asso v Topeka, 20 Wall 655 662

constitutions a new basis for judicial review was suggested the argument for which was elaborated by Hamilton with the Pending federal Constitution in mind in *The Federalist* No 78 as follows The interpretation of the laws is the proper and peculiar province of the courts A constitution is in fact and must be regarded by the judges as a fundamental law It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body and in case of irreconcilable difference between the two to prefer the will of the people declared in the constitution to that of the legislature as expressed in statute

The Constitutional Basis of Judicial Review

The attention of the Federal Convention was drawn to judicial review as offering a means for securing the conformity of State laws and constitutional provisions with the Supreme Law of the Land comprising this Constitution and the laws of Congress made in pursuance thereof and the treaties made under the authority of the United States of which the State judiciaries were made the first line of defense with presumably a final appeal to the Supreme Court [18] Nor has judicial review on this basis ever been seriously contested [19] Judicial review of acts of Congress has had a more difficult row to hoe although it is clearly predicated in the clause of Article III now under discussion and at any rate significant debate on the subject was concluded by Marshall s famous ruling in 1803 in Marbury v Madison [20] Not only has this decision never been disturbed its influence soon spread into the States with the result that long before the Civil War judicial review by State courts of local legislation was established under the local constitutions and usually with far less textual support than the Constitution of the United States affords judicial review of acts of Congress [21]

[18] *See* Cohens v Va 6 Wheat 264 (1821)

[19] The right of the Supreme Court however to take appeals from the State judiciaries in cases covered by the Supremacy Clause was for a time disputed by the Virginia Court of Appeals *See* preceding note and Martin v Hunter s Ressee 1 Wheat 304 (1814)

[20] 1 Cranch 137 (1803)

[21] On State judicial review prior to the Civil War *see* the present writer s *Doctrine of Judicial Review* 75 78 (Princeton Univ Press 1914)

Inasmuch as judicial review is exercised only in connection with the decision of *cases* and for the purpose of finding the law of the case it is intrinsically subject to the limitations adhering to the judicial function as such (*see* pp 132 135) Hence the Court will not render advisory opinions at the request of the coordinate departments and a self denying ordinance which it adopted in 1793 to this effect has perhaps with one exception been observed ever since[2]

Maxims Governing Its Exercise

Also the Court has announced from time to time certain other self restraining maxims which were evoked rather by its recognition of the extraordinary nature of judicial review than by judicial decorum as such Thus it has said that it will intervene only in clear cases and only when the constitutional issue cannot be avoided[3] The latter doctrine has sometimes led it to construe the challenged statute so narrowly as to impair greatly its intended operation[24] the former doctrine is frequently equivocal the application of it turning on the Court s philosophy, Thus the Court has never exercised its censorship of legislation whether national or State more

In 1793 the Supreme Court refused to grant the request of President Washington and Secretary of State Jefferson to construe the treaties and laws of the United States pertaining to questions of International Law arising out of the wars of the French Revolution Charles Warren *The Supreme Court in United States History* I 110-111 (Boston 1922) For the full correspondence *see 3 Correspondence and Public Papers of John Jay* (1890-1893) 486 (edited by Henry Phelps Johnston) According to E F Albertsworth Advisory Functions in Federal *Supreme Court* 23 *Georgetown Law Journal* 643 644-647 (May 1935) the Court rendered an advisory opinion to President Monroe in response to a request for legal advice on the power of the Government to appropriate federal funds for public improvements by responding that Congress *might do so* under the war and postal powers *See also* C J Hughes s letter to Senator Wheeler in *re* F D R s Court Packing plan Merlo Pusey *Charles Evans Hughes* II 756-757 (New York 1951)

[23] 1 *Willoughby on the Constitution* 25 33 *passim* (New York 1929)

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energetically than during the half century between 1887 and 1937 when its thinking was strongly colored by *laissez faire* concepts of the role of government This point of view translated into congenial constitutional doctrines like that of liberty of contract and the exclusive right of the States to govern industrial relations brought hundreds of State laws to grief as well as an unusual number of Congressional enactments Two persistent dissenters from this tendency were Justices Holmes and Brandeis both of whom thrust forward maxims of judicial self restraint in vain The Court had converted judicial review declared Justice Brandeis into the power of a super legislature while Justice Holmes complained that he could discover hardly any limit but the sky to the power claimed by the Court to disallow State acts which may happen to strike a majority of its members as for any reason undesirable [25] Conversely the so called Constitutional Revolution of 1937 connotes distinct lightening of judicial censorship in the economic realm based on a new set of constitutional values In short judicial review is at any particular period a function of its own product the constitutional law of the period

Effect of *Laissez Faire* on

All of which considerations raise the question of the importance of the doctrine of *Stare decisis* as an element of Constitutional Law Story was strongly of the opinion that it was fully operative in that field Whether however because of the difficulty of amending the Constitution or for cautionary reasons th Court took the position as early as 1851 that it would reverse previous decisions on constitutional issues when convinced that they were erroneous [6] An outstanding instance of this nature was the decision in the Legal Tender cases in 1870 reversing the decision which had been rendered in Hepburn v Griswold fifteen months earlier [27] and no less shattering to the pres

[5] Burns Baking Co v Bryan 264 U S 504 534 (1924) Baldwin v Mo 281 U S 586 595 (1930)

[6] The pioneer case on the point was *The Genessee Chief* 12 How 443 (1851) overturning *The Thomas Jefferson* 10 Wheat 428 (1825) *See* especially Ch J Taney s opinion 12 How at p 456

[27] 8 Wall 603 (1869) Knox v Lee 12 Wall 457 (1871)

tige ef *stare decisis* in the constitutional field was the Income Tax decision of 1895[8] in which the Court accepting Joseph H Choate s invitation to correct a century of error greatly expanded its interpretation of the direct tax clauses

Stare Decisis in Constitutional Law

The Constitutional Revolution of 1937 just alluded to produced numerous reversals of earlier precedents on the ground of error some of them the late James M Beck complained without the decent obsequies of a funeral oration[29] In 1944 Justice Reed cited fourteen cases decided between March 27 1937 and June 14 1943 in which one or more prior constitutional decisions were overturned[30] On the same occasion Justice Roberts expressed the opinion that adjudications of the Court were rapidly gravitating into the same class as a restricted railroad ticket good for this day and train only[31] Certainly confession of error on such a scale by the official wielders of judicial review is not persuasive of its tendency to preserve the nation s Constitution

Two other doctrinal limitations on judicial review are one which limits the *occasions* for judicial review and one which limits the *effect* of its exercise The former is the doctrine of Political Questions dealt with earlier (*see* p 140 above) The latter is the doctrine or theory of Departmental Construction which stems from the contention advanced by Jefferson and Jackson and endorsed by Lincoln that while the Court is undoubtedly entitled to interpret the Constitution independently in the decision of cases by the same token the other two equal branches of the Government are entitled to the like freedom in the exercise of their respective functions[3] Actually this claim was not pushed—some mythology to the contrary notwith

[8] Pollock v Farmers Loan and Trust Co 157 U S 429 and 158 U S 601 (1895)

[9] *Cong Record* March 24 1934 p 5480 (unofficial paging)

[30] Smith v Allwright 321 U S 649 665 note 10 (1944)

[31] *Ibid* 669

[3] The classic statement of the doctrine of D partmental Construction occurs in President Jackson s famous Veto Message of July 10 1832 2 Richardson *Messages and Papers of the President* 582 (Washington 1909)

standing—to the logical extreme of exonerating the President from the duty of enforcing the Court's decisions and ordinarily acts of Congress also unless and until they have been held by the Court to be void [33] Its intention was to assert for the President and Congress in their *legislative* capacity the right to shape new legislation in accordance with their independent views of constitutional requirements unembarrassed by the judicial gloss The brittleness of *stare decisis* in the Constitutional Law field goes far to support this contention

Congressional Restraints on Supreme Court Judicial Review

The chief external restraint upon judicial review arises from Congress's unlimited control over the size of the Court and its equally unlimited control over the appellate jurisdiction as well as of the total jurisdiction of the lower federal courts By virtue of the latter Congress is in position to restrict the actual exercise of judicial review at times or even to frustrate it altogether Thus in 1869 it prevented the Court from passing on the constitutionality of the Reconstruction Acts by repealing the latter's jurisdiction over a case which had already been argued and was ready for decision [34] and in World war II it confined the right to challenge the validity of provisions of the Emergency Price Control Act and of orders of the OPA under it to a single Emergency Court of Appeals and to the Supreme Court upon review of that court's judgments and orders [35]

Judicial Review and National Supremacy

It frequently happens that cases arising under this Constitution the laws of the United States and treaties in consequence of a prosecution by the State court one of its own law or of an action by the State itself under claiming something under a law of the State If in such a case the defendant sets up a counter claim under the Con

[33] Charles Warren *The Suprem Court In United States History* II 2_1 224 (Boston, 19_2) where it is asserted that Andrew Jackson never said John Marshall has mad his decision now let him enforce it

[34] *Ex parte* McCardl 7 Wall 506

[35] U S Cod tit 50 app §9_4 (d) Lockerty v Phillips 319 US 182 (1943) Yakus v U.S 321 U.S 414 (1944) Bowles v Willingham 321 U.S 503 (1944)

stitution or laws or treaties of the United States thereupon the case becomes one arising under this Constitution etc[36] By the famous 25th Section of the Judiciary Act of 1789 the substance of which still remains on the statute books such a case may be appealed to the Supreme Court if the decision of the highest State court to which under the law of the State it can come affirms the claim based on State law[37] while by an act passed in 1914 the Supreme Court may by writ of *certiorari* bring the kind of case described before itself for final review even if the claim which was based on State law was rejected by the State court in deference to national law[38]

All cases affecting ambassadors other public ministers and consuls The word all is used here in a rather Pickwickian sense as we learn from a case in which the Supreme Court refused to pass on the marital difficulties of the then Roumanian vice consul stationed at Cleveland Ohio[39]

Admiralty and Maritime Jurisdiction

Cases in admiralty and maritime jurisdiction These largely overlapping terms embody a broader content than they possessed in England[40] but connote the peculiarities of English admiralty procedure subject to modification by Congress to wit proceedings *in rem* against the vessel and the trial of both law and facts by a judge without the aid of a jury Today this jurisdiction embraces first cases involving acts on the high seas or in navigable waters including prize cases and torts or other injuries second those involving contracts and transactions connected with shipping employed on the high seas or in navigable waters[41] In the first category the *locality* of the act is the determinative element in the second *subject matter* is the decisive factor

What is meant by 'navigable waters in this connection? The English rule confined the term to the high seas and to rivers as far as the ebb and flow of the tide extended

[36] Cohens v Va 6 Wheat 264 (1821)
[37] U.S Code tit 28 § 344 (a) [38] Ibid §344 (b)
[39] Ohio *ex rel* Popovici v Agler 280 U S 379 (1930)
[40] New Jersey Steam Nav Co v Merchants Bk 6 How 344 (1848)
[41] Waring v Clarke 5 How 441 (1847) *ex parte* Easton 95 U S 68 (1877) North Pacific S S Co v Hall Brothers M R & S Co 249 U S 119 (1919) Grant Smith Porter Ship Co v Rohde 257 U S 469 (1922)

and in the case of *The Thomas Jefferson*[42] decided in 1825 the Court speaking by Justice Story, followed this rule Twenty seven years later in the case of *The Genessee Chief*[43] the Court speaking by Chief Justice Taney over ruled this holding on the ground that it was not adapted to American conditions and sustained an act of Congress giving the federal courts jurisdiction over the Great Lakes and connecting waters Later decisions have brought within the term canals waters wholly within a single State but forming a connecting link in interstate commerce waters navigable in their normal condition and finally waterways capable of being rendered navigable by reasonable im provement [44] Throughout this development the catalytic effect of the commerce clause clearly appears

Powers of Congress Over

Subject to judicial approval Congress may amend the maritime law[45] Nor does the Constitution forbid the States to create rights enforcible in federal admiralty Pro ceedings In 1940 a Florida statute whereby a cause of ac tion for personal injury due to another's negligence sur vives the death of the tort feasor against his estate was en forced in a proceeding *in rem* in a United States district court and the holding was sustained by the Supreme Court [46]

Even so the Court held in 1917 five Justices to four that a New York Workmen s Compensation statute was unconstitutional when applied to employees engaged in maritime work being destructive it said of the very uniformity in re pect to maritime matters which the Con stitution was designed to establish [47] and three years later it stigmatized an attempt by Congress to save such claimants their rights and remedies under State law as an uncon stitutional delegation of legislative power to the States [48]

[42] 10 Wheat 428 (1825) [43] 12 How 443 (1852)

[44] *The Daniel Ball* 10 Wall 567 (1871) *ex parte* Boyer 109 U S 629 (1884) United States *v* Appalachian Elec P Co 311 U S 377 (1940) Southern S S Co *v* N L R B 316 U S 31 (1942)

[45] This seems to be the algebraic sum of such cases as *The Lottawanna* 21 Wall 558 (1875) and *in re* Garnett 141 U S 1 (1890)

[46] Just *v* Chambers 312 U S 383 (1941)

[47] Southern Pacific Co *v* J nsen 244 U S 205 215 218 (1917)

[48] Knickerbocker Ice Co *v* Stewart 253 U S 149 163 166 (19.0)

Just *when* uniformity is disturbed by this species of legislation is therefore difficult to say Speaking for the Court in 1942 in sustaining the applicability of a Washington death act in an action brought by the widow of a harbor worker who was drowned in a navigable stream Justice Black hinted that the choice presented the Justices by the precedents was about a 50 50 one[49]

Controversies to which the United States shall be a party It is a universally accepted maxim of public law *that the sovereign may not be sued* except on his own consent In Chisholm v Georgia[50] decided in 1792 the Court held that the State of the United States were not sovereign within the sense of this principle—a ruling which was soon recalled by the adoption of the Eleventh Amendment (*see* p 241 below) On the same occasion Chief Justice Jay voiced the opinion that the United States i e the National Government was sovereign in this sense and this opinion has always been adhered to in theory

Suability of the United States

It follows that the 'controversies mentioned above are either those in which the United States appears as party plaintiff or those in which it has through Congress consented to be sued By the so called Tucker Act of 1887 the United States does consent to be sued in the Court of Claims at Washington on all claims founded upon any contract ' express or implied while by the Federal Tort Claims Act of 1946 it consents to be sued for injuries caused by the negligent or wrongful act or omission of any employee acting within the scope of his office or employment Excluded are claims for damage caused by loss of mails false imprisonment operations in wartime of the armed forces etc[51] Conversely the United States may spread its immunity to corporations created by it to act as instrumentalities of its powers but its intention to do so must be clear[52] The right of the government in actions against it to withhold evidence alleged to reveal military

[49] Davis v Dept of Labor 317 U S 249 252 253 (1942)
[50] 2 Dall 419
[51] U S Code tit 28 §41 (20) 79th Cong Public Law 601, tit IV
[52] Larson v Domestic and For Corp 337 U S 682 (1949)

secrets is very broad[52a] On the other hand in a case decided by it on June 17 1957, the Court held that in prosecutions in which it relies on information supplied it by the F B I the government must open the F B I files to the defense or abandon the case It is already apparent however that Congress will materially curtail this ruling[52b]

Suability of Federal officers

How is it as to suits brought against federal officials? Under the common law an officer of government who acts in excess of his lawful authority loses his official character and becomes legally responsible Following this rule the Supreme Court in 1882 held by a vote of five to four in the famous case of United States v Lee[53] that ejectment proceedings could be brought against army officers whom it found to be in illegal possession of the Arlington estate of the Lee family under an unlawful order of the President Many later cases follow this ruling others, however hold that the title of the government to property held in its name may not be tried in this way[54] In one of the two most recent cases, the Court appears to follow the Lee case in the other to reject its lead As Justice Frankfurter remarked in his dissenting opinion in the former the subject is not free from casuistry or as Justice Douglas put it in his opinion for the Court in the latter 'This is the type of case where the question of jurisdiction is dependent on decision of the merits[55]

Interstate Controversies

Controversies between two or more States From the outset the Court has generally construed its jurisdiction in this field liberally In earlier years its principal grist comprised State boundary disputes which were held to be justiciable not political in nature[56] Later arose a succession of suits in which the plaintiff State prayed that defendant State be enjoined from diverting or polluting the former s

[52a] United States v Reynolds 345 U S 1 (1953)
[52b] Jencks v U S 353 U S (1957)
[53] 106 U S 196 207 208 (1882)
[54] Stanley v Schwalby 163U S 255 (1896)
[55] *See* Larson v Domestic & Foreign Corp note 52 above at p 708 and Land v Dollar 330 U S 731 735 (1947)
[56] Rhode Island v Mass 12 Pet 657 721 736-737 (1838) On the whole subject *see* Charles Warren *The Supreme Court and Sovereign States* (Princeton Univ Press 1924)

water resources [57] A river said Justice Holmes is more than an amenity it is a treasure [58] In 1911 in Virginia v West Virginia[59] the Court undertook to determine the proportion of the public debt of the original States of Virginia which West Virginia ought to shoulder Speaking again by Justice Holmes it said The case is to be considered in the untechnical spirit proper for dealing with a quasi international controversy remembering that there is no municipal code governing the matter and that this Court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone [60] It was also at a later stage of these same proceedings that Chief Justice White for the Court asserted with much emphasis that the National Government possessed adequate authority to enforce the Court s decrees against any State which failed to comply with them —an announcement which stimulated West Virginia to abandon dilatory tactics and vote the sum which the Court had held to be due Virginia [61]

Latterly the Court has shown itself disinclined to exercise its original jurisdiction over controversies between two or more States as a shortcut method whereby the citizens of a State may secure a determination of their alleged rights against the legislative policies of another State or of the National Government [6] Nor may a State make itself a collection agency of debts due its citizens from another State and expect the Supreme Court to further the transaction by its original jurisdiction but an outright assignment of such debts to the plaintiff State is a horse of another color [63]

Judicial Invasion of State Power

By the terms of the Eleventh Amendment controversies

[57] Missouri v Ill and Sanitary Dist of Chicago 180 U S 208 (1901) Nebraska v Wyo 325 U S 589 (1945)

[58] New Jersey v N Y 283 U S 336 342 (1931)

[59] 220 U S 1 (1911)

[60] *Ibid* 27

[61] Virginia v W Va 246 U S 565 (1918)

[6] Alabama v Ariz 291 U S 286 (1934) Massachusetts v Mo 308 U S 1 17 (1939) Massachusetts v Mellon 262 U S 447 (1923)

[63] *Cf* New Hampshire v La 108 U S 76 (1883) *and* South Dakota v N C 192 U S 286 (1904) *See also* Wisconsin v Pelican Ins Co 127 U S 265 (1887) in which the Court declined to exercise its original jurisdiction in order to enforce a penalty against a Louisiana corporation for its violation of Wisconsin law

between a State and citizen of another State include only such controversies as are commenced by a State But the restrictive force of this limitation had been in recent decades greatly broken down by the practice of the United States District Courts in entertaining applications for injunctions against State officers and especially State public utility commissions forbidding them to attempt to enforce State laws or regulations which were claimed by the applicant to be unconstitutional with the result often of postponing the actual going into effect of such laws or regulations until—if ever—their constitutionality was sustained by the Supreme Court Sometimes a period of several years—in one case fifteen years—had elapsed before the State measure involved although it was finally held to be valid was allowed to go into operation [64] Certain statutory restraints have been laid upon this jurisdiction from time to time [65] but even more important in curbing it today are the present Supreme Court s enlarged views of State power in the regulation of public utility rates (*See* pp 254 255 below)

Judicial Protection of State Interests

Even so the grounds upon which such controversies commenced by the State itself may be based still remain broad the Court having recognized repeatedly within recent years the right of a State government to intervene in behalf of important interests of its citizens or a considerable section of them and to ask the Court to protect such interests against the tortious acts of outside persons and corporations of other States Thus in the leading case the Court granted the petition of Georgia for an injunction against certain copper companies in Tennessee forbidding them to discharge noxious gases from their works in Tennessee over the adjoining counties of Georgia and it was on this precedent that Governor Arnall relied chiefly in his successful appeal to the Court in 1945 to concede Georgia s right to maintain before it an original suit under the Sherman Act to enjoin an alleged conspiracy

[64] J Brandeis concurring in S Joseph Stockyards Co v U S 298 U S 38 90-91 (1936)

[65] *See* U S Code tit 28 §§41 (1) and 380

of some twenty railroads to fix discriminatory rates from which he claimed Georgia and the South generally suffered grave economic detriment[66] On the question of merits however Georgia eventually lost out in the latter case[67]

The Diversity of Citizenship Jurisdiction

The judicial power of the United States is extended to the kinds of controversies already mentioned because there is no other tribunal for such controversies It is extended to controversies between citizens of different States for a quite different reason namely to make available a tribunal for such cases which shall be free from local bias In this field accordingly Congress has felt free to leave the States a concurrent jurisdiction and as the statute now stands the United States District Courts have original jurisdiction of controversies between citizens of different States in which three thousand dollars or more is involved while controversies of the same pecuniary importance if brought by a plaintiff in a court of a State of which defendant is not a resident may be removed by the latter to the nearest United States District Court[68] It was long the doctrine of the Court that the national courts were free to decide cases of this description in accordance with their own notions of general principles of common law but later decisions overrule this view holding that the substantive law enforced must be that laid down by the courts of the State where the cause of action arose a rule which applies equally to suits in equity and actions at law[69]

The word citizens in this clause as well as other clauses of this paragraph has come practically to include corporations since the Court by an extended course of judicial legislation which was completed prior to the Civil War has established the jurisdictional fiction that the stockholders of a corporation are all citizens of the State

[66] Georgia v Tenn Copper Co 206 U S 230 (1907) Georgia v Pa R R Co 324 U S 439 (1945)

[67] *See* 340 U S 889 (1950)

[68] U S Code tit 28 §41 (1) and 71

[69] Erie R R Co v Tompkins 304 U S 64 (1938) Ruhlin v N Y Life Ins Co 304 U S 202 (1938) Freeman v Bee Machine Co 319 U S 448 (1943) The cases overruled are headed by Swift v Tyson 16 Pet 1 decided in 1842.

which chartered it even when the corporation is being sued by a stockholder from another State [70]

On the other hand the word State in the clause was held by the Court speaking by Chief Justice Marshall in 1805 to be confined to the members of the American confederacy with the consequence that a citizen of the District of Columbia could not sue a citizen of Virginia on the ground of diversity of citizenship [71] At the same time the Chief Justice indicated that the subject was one for legislative not for judicial consideration and apparently relying on this dictum Congress in 1940 adopted an amendment to the Federal Judicial Code to extend the jurisdiction of federal district courts to civil actions involving no federal question between citizens of different States or citizens of the District of Columbia and any State or Territory [72] This act was sustained by five Justices but for widely different reasons with the result that while the District of Columbia is still not a State its citizens may sue citizens of States in the absence of a federal question not on the basis of any statable constitutional principle but through the grace of what Justice Frankfurter has called conflicting minorities in combination [73]

The Diversity Clause and the D of C

Clashes between Federal and State Courts

Not surprisingly the presence within the same territory of two autonomous jurisdictions has produced numerous clashes between them In the vast majority of such cases the State courts involved have since the boisterous days of Worcester v Georgia come off second best thanks to the Supreme Court s vigorous application of the principle of National Supremacy Nor have occasional legislative efforts to protect the local interest proved especially successful By an act passed in 1793 [74] Congress forbade the federal courts to enjoin proceedings in State courts but that act is today honeycombed with exceptions First it has been held that an injunction will lie against proceedings in a State court

[70] Dodge v Woolsey 18 How 331 (1853) Ohio and Miss R R Co v Wheeler 1 Bl 286 (1861)
[71] Hepburn v Ellzey 2 Cr 445 (1805)
[72] 54 Stat 143 U S Code tit 28 §41 (1)
[73] National Mutual Ins Co v Tidewater Transfer Co 337 U S 582 655 (1949)
[74] 1 Stat 335 (1793) 28 U S C A §2283

to protect the lawfully acquired jurisdiction of a federal court against impairment or defeat[75] This exception is notably applicable to cases where the federal court has taken possession of property which it may protect by injunction from interference by State courts[76] Second in order to prevent irreparable damage to persons and property the federal courts may restrain the legal officers of a State from taking proceedings to State courts to enforce State legislation alleged to be unconstitutional[77] Nor does the prohibition of §265 of the Judicial Code [§720 Rev Stat] prevent injunctions restraining the execution of judgemnts in State courts obtained by fraud[78] the restraint of proceedings in State cou ts in cases which have been removed to the federal courts[79] nor until lately proceedings in State courts to relitigate issues previously adjudicated and finally settled by decrees of a federal court[80] Nor has comity proved a more dependable reliance[81]

In recent years moreover a new source of interference by federal courts in the domain of State judicial process has emerged in consequence first of the impact of the expanding concept of due process upon enforcement by the

[75] Freeman *v* Howe 24 How 450 (1861) Julian *v* Central Trust Co 193 U S 93 (1904) Riverdale Cotton Mills *v* Ala & Ga Mfg Co 198 U S 188 (1905) Looney *v* Eastern Texas R Co 247 U S 214 (1918)

[76] Farmers Loan & Trust Co *v* Lake St Elev R Co 177 U S 51 (1900) Riverdale Cotton Mills *v* Ala & Ga Mfg Co 198 U S 188 (1905) Julian *v* Central Trust Co 193 U S 93 (1904) Kline *v* Burke Construction Co 260 U S 226 (1922) For a discussion of this rule *see* Toucey *v* New York Life Ins Co 314 U S 118 134 136 (1941)

[77] *Ex parte* Young 209 U S 123 (1908) is the leading case

[78] Arrowsmith *v* Gleason 129 U S 86 (1889) Marshall *v* Holmes 141 U S 589 (1891) Simon *v* Southern R Co 236 U S 115 (1915)

[79] French *v* Hay 22 Wall 231 (1875) Dietzsch *v* Huidekoper 103 U S 494 (1881) Madisonville Traction Co *v* St Bernard Mining Co 196 U S 239 (1905)

[80] The earlier cases are Root *v* Woolworth 150 U S 401 (1893) Prout *v* Starr 188 U S 537 (1903) Julian *v* Central Trust Co 193 U S 93 (1904) The more recent case referred to is Toucey *v* New York Life Ins Co 314 U S 118 (1941) This was a 5 to 3 decision in which J Frankfurter spoke for the Court JJ Reed *Roberts and* C J *Vinson dissented*

[81] *Cf* Riehle *v* Margolies 279 U S 218 (1929) and Brillhart *v* Excess Ins Co 316 U S 491 (1942) On one occasion however comity blossomed into active cooperation This was in the case of Ponzi *v* Fessenden 258 U S 259 (1922) There the Court upheld the right of the Attorney General of the United States to consent to the transfer on a writ of *habeas corpus* of a federal prisoner to a State court to be there put on trial upon a pending indictment

States of their criminal laws and secondly of the almost complete freedom claimed by the Supreme Court today to decline to review decisions which right or wrong do not present questions of sufficient gravity The natural product of these cooperating factors has been a vast increase in the number of petitions filed in federal district courts for the writ of *habeas corpus* in the name of persons accused or convicted of crime in the States in alleged violation of their constitutional rights In a case decided in 1948 Justice Murphy while favoring this increased availability of the writ revealed that in the fiscal years 1944 1945 and 1946 an average of 451 *habeas corpus* petitions were filed each year in federal district courts by persons in State custody although an average of only six per cent resulted in a reversal of the conviction and release of the petitioner [82] statistics which are confirmed in Justice Frankfurter s supplementary opinion in Brown *v* Allen decided February 9 1953 In this opinion frank admission is made that the writ has possibilities for evil as well as for good that abuse of it may undermine the orderly administration of justice the responsibility for which rests largely with the States and in consequence weaken the forces of authority that are essential for civilization [83]

The *Habeas Corpus* Problem

¶2 In all cases affecting ambassadors other public ministers and consuls and those in which a State shall be party the Supreme Court shall have original jurisdiction In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make

Jurisdiction is either original or appellate In Marbury *v* Madison the case in which the Court first pronounced an act of Congress unconstitutional it was held that Congress could not extend the original jurisdiction of the Supreme Court to other cases than those specified in the first sentence of this paragraph [84] But if a case in which the State

[82] Wade *v* Mayo 334 U S 672 682 (1948)

[83] Brown *v* Allen 344 U S 443 (1953) All quoted passages are from Justice Frankfurter s supplementary opinion *ibid* 488 513

[84] 1 Cr 137 (1803) This holding was anticipated by CJ Ellsworth in his opinion in Wiscart *v* Dauchy 3 Dall 321 (1796)

is party is also one "arising under the Constitution and laws of the United States, it may if Congress so enacts be brought elsewhere in the first instance[85] Also this jurisdiction is subject to the limitations imposed by the Eleventh Amendment

The Court's appellate jurisdiction Congress may enlarge or diminish at will so long as it does not exceed the catalogue of cases and "controversies" given in ¶1 above The appellate jurisdiction of the Supreme Court as to fact in cases of law is much curtailed by Amendment VII Even so the Court will always review findings of fact by a State Court or by an administrative agency to any extent necessary to vindicate rights claimed under the Constitution[86]

¶3 The trial of all crimes except in cases of impeachment shall be by jury and such trial shall be held in the State where the said crimes shall have been committed but when not committed within any State the trial shall be at such place or places as the Congress may by law have directed

In spite of its mandatory form the opening clause of this paragraph like the parallel provision on the same subject in Amendment VI only establishes trial by jury as a privilege of accused persons which such persons may accordingly waive if they choose[87] The substance of the other two clause is also covered by that amendment

SECTION III

¶1 Treason against the United States shall consist only in levying war against them or in adhering to their enemies giving them aid and comfort No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court

Treason against the United States

[85] Cohens v Va 6 Cr 264 (1821) Ames v Kan 111 U S 449 (1884) United States v Calif 297 U S 175 (1936)

[86] Fiske v Kan 274 U S 380 (1927) Crowell v Benson 285 U S 22 (1932) *also* North Carolina v U S 325 U S 507 (1945) in which the Court set aside an order of the I C C increasing intrastate passenger rates as having insufficient support in the findings

[87] Patton v U S 281 U S 276 (1930)

Levying war consists in the first place in a combination or conspiracy to effect a change in the laws or the government by force but a war is not levied until the treasonable force is actually assembled[1]

One adheres to the enemies of the United States giving them aid and comfort when he knowingly furnishes them with assistance of any sort[2]

Vicissitudes of the Treason Clause

Overt act means simply open act that is to say an act which may be testified to and not a mere state of consciousness Otherwise the precise force of this requirement is still a matter of some doubt At the common law treason by levying war involved a conspiracy so that if an overt act of war in pursuance of the conspiracy took place all the conspirators were equally liable for it at the place where it occurred and in the Bollman case early in 1807 Chief Justice Marshall followed the common law doctrine A few weeks later however while presiding at Richmond over the trial of Aaron Burr for treason he turned his back on this doctrine completely by holding that Burr must be linked with the conspiracy by an overt act of his own And in 1945 the Court held five to four that in a prosecution for treason by giving aid and comfort the overt act or acts testified to must be of themselves sufficient to establish treasonable intent This holding based in part on an error of history has since been abandoned for something more nearly approaching the older doctrine that a traitor may be convicted on any kind of admissible evidence into which the testimony of two witnesses to an overt act enters[3]

¶2 The Congress shall have power to declare the punishment of treason but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attained

[1] *Ex parte* Bollman 4 Cr 75 (1807)

[2] Charles Warren, "What is Giving Aid and Comfort to the Enemy?" 27 *Yale Law Journal* 331 347 (1918)

[3] *Cf* the Bollman case cited above Beveridge s *Marshall* III 618-6 6 *Willoughby on the Constitution* II 1125 1133 Cramer v U.S 325 U S (1945) Haupt v U.S 330 U S 631 (1947) The error referred to was J Jackson s mistaken idea that the two-witness requirement originated in the Constitution It comes from the Treason Trials Act of 1696 (7 and 8 Wm III c 3) David Hutchison *The Foundations of the Constitution* 215 (New York 1928)

ARTICLE IV

This article sometimes called the Federal Article defines in certain important particulars the relations of the States to one another and of the National Government to the States

SECTION I

¶Full faith and credit shall be given in each State to the public acts records and judicial proceedings of every other State And the Congress may by general laws prescribe the manner in which such acts records, and proceedings shall be proved and the effect thereof

In accordance with what is variously known as Conflict of Laws Comity or Private International Law rights acquired under the laws or through the courts of one country may often receive recognition and enforcement in the courts of another country and it is the purpose of the above section to guarantee that this shall be the case among the States in certain instances [1]

Operation of the Full Faith and Credit Clause on Judgments

Article IV, Section 1 has had its principal operation in relation to judgments The cases fall into two groups First those in which the judgment involved was offered as a basis of proceedings for its own enforcement outside the State where rendered as for example when an action for debt is brought in the courts of State B on a judgment for money damages rendered in State A secondly those in which the judgment involved was offered in conformance with the principle of *res judicata* in defense in a new or 'collateral proceeding growing out of the same facts as the original suit as for example when a decree of divorce granted in State A is offered as barring a suit for divorce by the other party to the marriage in the courts of State B

By an act of Congress passed in 1790, and still on the statute books the records and judicial proceedings of the Courts of any State shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which

[1] T M Cooley *Principles of Constitutional Law* 196-206 (3rd Ed Boston 1898)

they are taken [2] In the pioneer cases of Mills v Duryee and Hampton v McConnel this language was given literal application by the Marshall Court and the judgments there involved were held to be entitled in the courts of sister States to the validity of final judgments [3] In 1839 however in McElmoyle v Cohen[4] the Court then in the grip of States Rights prepossessions ruled that the Constitution was not intended materially to interfere with the essential attributes of the *lex fori* (the forum State) that the act of Congress only established a rule of evidence—of conclusive evidence to be sure but still of evidence only—and that it was necessary in order to carry into effect in a State the judgment of a court of a sister State to institute a fresh action in a court of the former in strict compliance with its laws and that consequently when remedies were sought in support of the rights accruing in another jurisdiction they were governed by the *lex fori*

One consequence of this arrant nullification of the Act of 1790 is that even nowadays the Court is sometimes confronted with the contention that a State need not provide a forum for some particular type of judgement from a sister State that it chooses to disrelish—a contention which the Court has by no means met with clear cut principles [5]

The Jurisdictional Question

An even more important consequence however of the Court s partial nullification of the Act of 1790 has been the spawn of cases it has bred raising the question whether the judgment for which recognition was being sought under the full faith and credit clause was rendered with jurisdiction i e in accordance with some test or standard alleged not to have been observed by the court rendering it Foreshadowed in a dissenting opinion in 1813 [6] this doctrine was definitely accepted by the Court in 1850 as to judgments in *personam* [7] and in 1874 as to judgments

[2] U S Code tit 28 §687 [3] 7 Cr 485 (1813) 3 Wheat 234
[4] McElmoyle v Cohen 13 Pet 326 (1839)
[5] *Cf* Anglo-American Provision Co v Davis Provision Co 191 U S 373 (1903) and Fauntleroy v Lum 210 U S 230 (1908) Justice Holmes who spoke for the Court in both cases asserted in his opinion in the latter that the New York statute was directed to jurisdiction the Mississippi statute to merits but four Justices could not grasp the distinction
[6] *See* 5 Cr at 486-487 [7] D Arcy v Ketchum 11 *How* 165 (1850)

in rem[8] and in 1878 was transferred from the shadowy realm of fundamental principles of justice to the more solid contour of the due process clause of Amendment XIV[9]

What the law and doctrine of these cases boils down to is this A judgment of a State court in a civil not a penal cause within its jurisdiction and against a defendant lawfully summoned or against lawfully attached property of an absent defendant is entitled to as much force and effect against the person summoned or the property attached when the question is presented for decision in a court in another State as it has in the State in which it was rendered[10] Today indeed the jurisdictional question comprises the principal grist of cases arising under Article IV Section 1 but is most copiously illustrated in divorce cases particularly in those in which the respondent to a suit for divorce has offered in defense an earlier divorce from the courts of some sister State most likely Nevada

Divorce Cases a Judicial Tilting Field

By the almost universally accepted view prior to 1906 a proceeding in divorce was one against the marriage status i e *in rem* and hence might be validly brought by either party in any State where he or she was *bona fide* domiciled[11] and conversely when the plaintiff did not have a *bona fide* domicile in the State a court could not render a decree binding in other States even if the nonresident defendant entered a personal appearance[1] That year however the Court discovered by a vote of five to four a situation in which a divorce proceeding is one *in personam*

The case referred to is Haddock v Haddock[13] while the earlier rule is illustrated by Atherton v Atherton[14] decided

[8] Thompson v Whitman 18 Wall 457 (1874)
[9] Pennoyer v Neff 95 U S 714 (1877) *see also* Milliken v Meyer 311 U S 457 (1940)
[10] Chicago and A R Co v Wiggins Ferry Co 119 U S 615 622 (1887) Hanley v Donoghue 116 U S 1 3 (1885) Huntington v Attrill 146 U S 657 (1892)
[11] Cheever v Wilson 9 Wall 108 (1870)
[1] Andrews v Andrews 188 U S 14 (1903) *See also* German Savings Society v Dormitzer 192 U S 125 (1904)
[13] 201 U S 562 (1906) *See also* Thompson v Thompson 226 U S 551 (1913)
[14] 181 U S 155 162 (1901)

five years previously. In the latter it was held that the former decided that a divorce granted a husband without personal service upon the wife, who at the time was residing in *another State, was entitled to recognition under the "full* faith and credit" clause and the acts of Congress. The difference between the cases consisted solely in the fact that in the Atherton case the husband had driven the wife from their joint home by his conduct, while in the Haddock case he had deserted her. The Court which granted the divorce in Atherton v. Atherton was held to have had jurisdiction of the marriage status, with the result that the proceeding was one *in rem* and hence required only service by publication upon the respondent. Haddock's suit, on the contrary, was held to be as to the wife *in personam*, and so to require personal service upon her, or her voluntary appearance, neither of which had been had; although, notwithstanding this, the decree in the latter case was held to be valid as to the State where obtained on account of the State's inherent power to determine the status of its own citizens. The upshot was a situation in which a man and a woman, when both were in Connecticut, were divorced; when both were in New York, were married; and when *the one was in Connecticut and the other in New York*, the former was divorced and the latter married. In Atherton v. Atherton the Court had earlier acknowledged that "a husband without a wife, or a wife without a husband, is unknown to the law."

Nor in overruling Haddock v. Haddock in 1942 did the Court clarify the situation materially. For while holding that any State is entitled to divorce anybody who is *bona fide* domiciled within its borders, even though the other spouse, being outside the State, was not personally served, yet it has since handed down another ruling the logic of which appears to expose to the danger of going to jail anybody who, having left his home State, gets a divorce in another State, remarries, and then returns to State No. 1 or *goes to some third State*, provided a jury of his last place of residence can be persuaded that his residence in the divorcing State lacked "domiciliary intent," that is to say,

result was justified as accommodating the interests of both New York and Nevada in the broken marriage by restricting each State to matters of dominant concern to it the concern of New York being that of protecting the abandoned wife against impoverishment

Assuming that the doctrine of divisible divorce sticks it may be tenable to assert that an *ex parte* divorce founded upon acquisition of domicile by one spouse in the State which granted it is effective to destroy the marital status of both parties in the State of domiciliary origin and probably in all other States and therefore to preclude subsequent prosecutions for bigamy but not to alter rights as to property alimony or custody of children in the State of domiciliary origin of a spouse who was neither served nor personally appeared [17]

Extraterritorial Operation of State Laws

As to the extrastate protection of rights which have *not matured into final judgments* the unqualified rule prior to the Civil War was that of the dominance of local policy over the rules of comity [18] This was stated by Justice Nelson in the Dred Scott case as follows No State can enact laws to operate beyond its own dominions Nations from convenience and comity recognizes [*sic*] and administer the laws of other countries But of the nature extent, and utility of them, respecting property or the state and condition of persons within her territories each nation judges for itself He added that it was the same as to a State of the Union in relation to another It followed that even though Dred had become a free man in consequence of his having resided in the free State of Illinois he had nevertheless upon his return to Missouri

[17] May *v* Anderson 345 U S 528 (1953) which involved the custody of children supports the rationale of the Estin case A Florida divorce decree was at the bottom of another recent case in which the daughter of a divorced man by his first wife and his legatee under his will sought to attack his divorce in the New York courts and thereby indirectly his third marriage The Court held that inasmuch as the attack would not have been permitted in Florida under the doctrine of *res judicata* it was not permissible under the full faith and credit clause in New York Johnson *v* Muelberger 341 U S 581 (1951) On the whole it appears that the principle of *res judicata* is slowly winning out against the principle of domicile *See also* Sutton *v* Leib 342 U S 402 (1952)

[18] Bank of Augusta *v* Earle 13 Pet 519 589 596 (1839) *See* Kryger *v* Wilson 242 U S 171 (1916) Bond *v* Hume 243 U S 15 (1917)

which had the same power as Illinois to determine its local policy respecting rights acquired extraterritorially reverted to servitude under the laws and decisions of that State[19]

In a case decided in 1887 however the Court remarked Without doubt the constitutional requirement Art IV §1 that full faith and credit shall be given in each State to the public acts records and judicial proceedings of every other State implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home [20] And this proposition was later held to extend to State constitutional provisions[21] More recently this doctrine has been stated in a much more mitigated form the Court saying that where statute or policy of the forum State is set up as a defense to a suit brought under the statute of another State or territory or where a foreign statute is set up as a defense to a suit or proceedings under a local statute the conflict is to be resolved not by giving automatic effect to the full faith and credit clause thereby compelling courts of each State to subordinate its own statutes to those of others but by appraising the governmental interest of each jurisdiction and deciding accordingly[22] Obviously this doctrine endows the Court with something akin to an arbitral function in the decision of cases to which it is applied just as does the concept of divided divorce

Thus it is today the settled rule that the defendant in a transitory action is entitled to all the benefits resulting from whatever material restrictions the statute under which plaintiff s right of action originated sets thereto except that courts of sister States cannot be thus prevented from taking jurisdiction in such cases[23] Nor is it alone to de-

[19] 19 How 393 460 (1857) *Cf* Bonaparte *v* Tax Court 104 U S 592 (1882) where it was held that a law exempting from taxation certain bonds of the enacting State did not operate extraterritorially by virtue of the full faith and credit clause.

[20] Chicago & Alton R Co *v* Wiggins Ferry 119 U S 615 622 (1887)

[21] Smithsonian Institution *v* St John 214 U S 19 (1909)

[22] Alaska Packers Asso *v* Industrial Acci Commission 294 U S 532 (1935) Bradford Electric Light Co *v* Clapper 286 U S 145 (1932)

[23] Northern Pacific R R *v* Babcock 154 U S 190 (1894) Atchison T & S F R Co *v* Sowers 213 U S 55 67 (1909)

fendants in transitory actions that the full faith and credit clause is today a shield and a buckler Some legal relationships are so complex the Court holds that the law under which they were formed ought always to govern them as long as they persist[24] One such relationship is that of a stockholder and his corporation[25] another is the relationship which is formed when one takes out a policy in a fraternal benefit society[26] Stock and mutual insurance companies and mutual building and loan associations on the other hand are beings of a different stripe[27] as to them the *lex fori* controls Finally the relationship of employer and employee so far as the obligations of the one and the rights of the other under workmen s compensation acts are concerned is in general governed by the law of the State under which the relationship was created[28]

Unrealized Possibilities of the Clause

The question arises whether the application to date of the full faith and credit clause can be said to have met the expectations of its framers A partial answer is that there are few clauses of the Constitution the literal possibilities of which have been so little developed as the full faith and credit clause Congress has the power under the clause to decree the effect that the statutes of one State shall have in other States This being so it does not seem extravagant to argue that Congress may under the clause describe a certain type of divorce and say that it shall be granted recognition throughout the Union and that no other kind shall Or to speak in more general terms Congress has under the clause power to enact standards whereby uniformity of State legislation may be secured as to almost any matter in connection with which interstate recognition of private rights would be useful and valuable[29]

[24] Modern Woodmen of Am v Mixer 267 U S 544 (1925)

[25] Converse v Hamilton 224 U.S 243(1912) Selif v Hamilton 234 U S 652 (1914)

[26] Royal Arcanum v Green 237 U.S 531 (1915) (f'd in Modern Woodmen v Mixer cited above Order of Travelers v Wolfe 331 U S 586 588 589 637 (1947)

[27] National Mutual Building and Loan Asso v Brahan, 193 U S 635 (1904) Pink v A A A Highway Express 314 U S 201 206-208 (1941)

[28] *Bradford Electric Co v Clapper 286 U S 145 158 (1932) is the* leading case

[29] *See* W W Cook "The Powers of Congress under the Full Faith and

SECTION II

¶1 The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States

This is a compendious although not especially lucid redaction of Article IV of the Articles of Confederation First and last some four theories have been offered as to its real intention and meaning The first is that the clause is a guaranty to the citizens of the different States of equal treatment by Congress—is in other words a species of equal protection clause binding on the National Government The second is that the clause is a guaranty to the citizens of each State of all the privileges and immunities of citizenship that are enjoyed in any State by the citizens thereof—a view which if it had been accepted at the outset might well have endowed the Supreme Court with a reviewing power over restrictive State legislation as broad as that which it later came to exercise under the Fourteenth Amendment The third theory of the clause is that it guarantees to the citizen of any State the rights which he enjoys as such even when sojourning in another State that is to say enables him to carry with him his rights of State citizenship throughout the Union without embarrassment by State lines Finally the clause is interpreted as merely forbidding any State to discriminate against citizens of other States in favor of its own Though the first theory received some recognition in one of the opinions in the Dred Scott case[1] it is today obsolete Theories 2 and 3 have been specifically rejected by the Court the fourth has become a settled doctrine of Constitutional Law[2]

Four Theories of the Clause

Yet even this theory is not all inclusive For there are certain privileges and immunities for which a State as *parens patriae* may require a previous residence like the right to fish in its streams to hunt game in its fields and

Credit Clause 28 *Yale Law Journal* 421 434 (1919) 1 *Schofield Essays on Constitutional Law and Equity* 211*ff* (1921)

[1] Scott v Sandford 19 How 393 527 529 (1857)
[2] McKane v Durston 153 U S 484 487 (1894) Detwit v Osborne 135 U S 492 498 (1890)
[3] The Slaughter House 16 Wall 36 77 (1873)

forests to divert its waters even to engage in certain businesses of a quasi public nature like that of insurance[4] Furthermore universal practice has established another exception to which the Court has given approval in the following words A State may by a rule uniform in its operation as to citizens of the several States require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office [5]

Nor does the term ' citizens include corporations[6] Thus a corporation chartered elsewhere may enter a State to engage in local business only on such terms as the State chooses to lay down provided these do not deprive the corporation of its rights under the Constitution—of its right for instance to engage in interstate commerce or to appeal to the national courts or once it has been admitted into a State to receive equal treatment with corporation chartered by the latter[7]

Also while a State may not substantially discriminate between residents and non residents in the exercise of its taxing powers[8] yet what may at first glance appear to be a discrimination may turn out not to be when the entire system of taxation prevailing in the enacting State is considered Nor are occasional or accidental inequalities to a non resident taxpayer sufficient to defeat a scheme of taxation whose operation in the judgment of the Court is generally equitable The Court will not tithe mint anise and cummin [9]

[4] McCready *v* Va 94 U S 391 (1877) Geer *v* Conn *161 U S 519 (1896)* Hudson County Water Co *v* McCarter 209 U S *349 (1908)* LaTourette *v* McMaster 248 U S 465 (1919) In the recent case of Toomer *v* Witsell 334 U S 385 403 (1948) the Court refused to follow the above rule as to free swimming fish caught in the three mile belt off South Carolina *See also* Mullaney *v* Anderson 342 U S 415 (1953) in which the Toomer case was followed

[5] Blake *v* McClung 172 U S 239 256 (1898)

[6] Paul *v* Va 8 Wall 168 (1868)

[7] International Paper Co *v* Mass 246 U S 135 (1918) Terral *v* Burke Constr Co 257 U S 529 (1922) *See also* Crutcher *v* Ky 141 U S 47 (1891)

[8] Ward *v* Md 12 Wall 418 424 (1871) Travis *v* Yale and Towne Mfg Co 252 U S 60 79 80 (1920)

[9] Travelers Ins Co *v* Conn 185 U S 364 371 (1902) Maxwell *v* Bugbee 250 U S 525 (1919)

¶2 A person charged in any State with treason felony or other crime who shall flee from justice and be found in another State shall on demand of the executive authority of the State from which he fled be delivered up to be removed to the State having jurisdiction of the crime

Interstate Extradition on a Voluntary Basis

The word crime here includes every offense forbidden and made punishable by the laws of the State where the offense is committed [10] The performance of the duty which is cast by this paragraph upon the States was imposed by an act of Congress passed February 12 1793 upon the governors thereof but the Supreme Court shortly before the Civil War ruled that while the duty is a legal duty it is not one the performance of which can be compelled by writ of mandamus [11] and in consequence governors of States have often refused compliance with a demand for extradition when in their opinion substantial justice required such refusal On the other hand the Act of 1793 does not prevent a State from surrendering one who is not a fugitive within its terms nor from trying a fugitive for a different offense than the one for which he was surrendered [12]

As was pointed out earlier the deficiencies of this clause have been today partly remedied by compacts among the States and by uniform State legislation as well as by recent national legislation under the commerce clause Especially important in the latter connection is the Act of May 18 1934 which makes it an offense against the United States for a person to flee from one State to another in order to avoid prosecution or the giving of testimony in certain cases [13]

¶3 No person held to service or labor in one State under the laws thereof escaping into another shall in consequence of any law or regulation therein be discharged from such

[10] Kentucky v Dennison 24 How 66 99 (1861)
[11] *Ibid* cf Virginia v W Va 246 U S 566 (1918)
[12] Lascelles v Ga 148 U S 537 (1893) Innes v Tobin 240 U S 123 (1916)
[13] U S Code tit 18 §408e

service or labor but shall be delivered up on claim of the party to whom such service or labor may be due

'Person *held to service or labor* meant slave or apprentice The paragraph is now of historical interest only

SECTION III

¶1 New States may be admitted by the Congress into this Union but *no new State shall be formed or erected within* the jurisdiction of any other State nor any State be formed by the junction of two or more States or parts of *States without the consent of the legislatures of the* States concerned as well as of the Congress

A Union of Equal States

The theory which the Supreme Court has adopted in interpretation of the opening clause of this paragraph is that when new States are admitted into this Union they are admitted on a basis of equality with the previous members of the Union By the Joint Resolution of December 29 1845 Texas was admitted into the Union on an equal footing with the original States in all respects whatever [1] Again and again in adjudicating the rights and duties of States admitted after 1789 the Supreme Court has referred to the condition of equality as if it were an inherent attribute of the Federal Union [2] In 1911 it invalidated a restriction on the change of location of the State capital which Congress had imposed as a condition for the admission of Oklahoma on the ground that Congress may not embrace in an enabling act conditions relating wholly to matters under State control [3] In an opinion from which Justice Holmes and McKenna dissented Justice Lurton argued The power is to admit new States into *this* Union This Union was and is a union of States equal in power dignity and authority each competent to exert

[1] Justice Harlan speaking for the Court in United States v Tex 143 U S 621 634 (1892) 9 Stat 108

[2] Permoli v New Orleans 3 How 589 609 (1845) McCabe v Atchison T & S F R Co 235 U S 151 (1914) Illinois Central R Co v Illinois 146 U S 387 434 (1892) Knight v United Land Asso 142 U S 161 183 (1891) Weber v State Harbor Comrs 18 Wall 57 65 (1873)

[3] Coyle v Smith *221 U S 559 567 (1911)*

that residuum of sovereignty not delegated to the United States by the Constitution itself

Sovereignty is one thing however property a different thing Holding that a mere agreement in reference to property involved no question of equality of status the Supreme Court upheld in Stearns v Minnesota[4] a promise exacted from Minnesota upon its admission to the Union which was interpreted to limit its right to tax lands held by the United States at the time of admission and subsequently granted to a railroad The equal footing doctrine has had an important effect however on the property rights of new States to soil under navigable waters In Pollard v Hagan[5] the Court held that the original States had reserved to themselves the ownership of the shores of navigable waters and the soil under them and that under the principle of equality the title to the soils of navigable waters passes to a new State upon admission This was in 1845 The Court refused 102 years later to extend the same rule to the three mile marginal belt along the coast[6] and shortly after applied the principle of the Pollard case in reverse as it were in United States v Texas[7] Since the original States had been found not to own the soil under the three mile belt Texas which concededly did own this soil before its annexation to the United States was held to have surrendered its dominion and sovereignty over it upon entering the Union on terms of equality with the existing States To this extent the earlier rule that unless otherwise declared by the Congress the title to every species of property owned by a territory passes to the State upon admission[8] has been qualified

State Proprietorship versus Federal Dominion

[4] 179 U S 223 245 (1900)

[5] 3 How 212 223 (1845) *see also* Martin v Waddell 16 Pet [367 410 (1842)

[6] United State v Calif 332 U S 19 38 (1947) United States v La 339 U S 699 (1950)

[7] 339 U S 707 716 (1950) [8] Brown v Grant 116 U S 207 212 (1886)

[8a] Recently however Congress appears to have otherwise declared to wit by the so called Submerged Lands Act and the Outer Anti neutral Shelf Lands Act which were respectively approved by the President on May 22 and August 7 1957 The precise effect of this singular effort to revive the outworn claims of certain states facing on the sea—Louisiana Florida Texas and California—remains still to be judicially determined *See* Public Laws 31 and 212 83rd Congress 1st Sess Chapters 65 and 345

¶2 *The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State*

What Property Congress May Dispose of

Congress s control of the public lands is derived from this paragraph The relation of the National Government to such of its public lands as lie within the bound ies of States is not however that of simple proprietorship but includes many of the elements of sovereignty The States may not tax such lands[9] and Congress may punish trespassers upon them though such legislation may involve the exercise of the police power [10] Furthermore in disposing of such lands Congress may impose conditions on their future alienation or that of the water power thereon which the State where the lands are may not alter [11]

Although other property undoubtedly includes war ships this fact did not as we saw earlier deter President Roosevelt from handing over to great Britain in September 1940 in return for leases from the latter of certain sites for naval bases in the west Atlantic fifty newly conditioned destroyers without consulting Congress But as Congress later appropriated money for the construction of the said basis it may perhaps be thought to have ratified the arrangement

The debts of various nations of Europe to the United States are also property belonging to the United States so that Congress s ratification had to be obtained to agreements for their settlement after World War I Likewise electrical power developed at a dam of the United States is property belonging to the United States

But the above clause is also important for another reason —it is the source to which has sometimes been traced the power of the United States to govern territories though

[9] Van Brocklin v Tenn 117 U S 151 (1886) *Cf* Wilson v Cook 327 U S 474 (1946)

[10] Camfield v U S 167 U S 518 (1897)

[11] United States v San Francisco 310 U S 16 (1940) This case involved the famous Hetch Hetchy grant by the Raker Act of December 19 1913

as we heve seen this and the power to acquire territory are best ascribed simply to the sovereignty inherent in the National Government as Such[12] as is also the power to cede territory to another government as for example the Philippine Islands to the Philippine Republic

Incorporated and Unincorporated Territories

And while the United States may through the treaty making power acquire territory it incorporation in the United States ordinarily waits upon action by Congress Such incorporation may be effected either by admitting the territory into this Union as new States or less completely by extending the Constitution to it[13] Until territory is thus incorporated into the United States persons born therein are not citizens of the United States under the Fourteenth Amendment though Congress may admit them to citizenship as in fact it has done in several instances (*see* pp 55 57) and the power of Congress in legislating for such unincorporated territory is limited only by fundamental rights of the individual of which trial by jury is not one[14] Incorporation however makes the inhabitants of territories citizens of the United States and extends to them full protection of the Constitution Alaska is an incorporated territory in this nomenclature Samoa Guam Wake etc are probably unincorporated while recently a new category has appeared with the elevation of Puerto Rico to the status of commonwealth — an experiment decidedly worth study Conquered territory may be governed temporarily by the President by virtue of his power as Commander in Chief of the Army and Navy but Congress may at any time supplant such government with one of its own creation[15]

SECTION IV

¶The United States shall guarantee to every State in this Union a republican form of government and shall protect each of them against invasion and on application of the

[1] The entire subject of the power to acquire and govern territories is comprehensively treated in I *Willoughby on the Constitution* chs 23 32

[13] Downes v Bidwell 182 U S 244 (1901)

[14] Dorr v U S 195 U S 138 (1904)

[15] Santiago v Nogueras 214 U S 260 (1909)

legislature or of the executive (when the legislature cannot be convened) against domestic violence

National Guaranties to the States a Political Question

The United States here means the governing agency created by the Constitution but especially the President and the Congress for the Court has repeatedly declared that what is a republican form of government is a political question and one finally for the President and the houses to determine within their respective spheres [1] Thus Congress may approve of the government of a new State by admitting it into the Union or the houses of Congress may indicate their approval by seating the Senators and Representatives of the State, or the President may do the same by furnishing a State with military assistance in cases where he is authorized so to act

Inasmuch as the adoption of the initiative referendum and recall by many States some decades back appears not to have imperiled their standing with Congress it must be concluded that a considerable admixture of direct government does not make a government unrepublican On the other hand it has been recently urged in Congress that certain southern States have so reduced the number of qualified voters within their borders by making the payment of a poll tax a prerequisite to voting that they are no longer republican in form and that therefore Congress could and should invalidate such requirements

The President is authorized by statute to employ the forces of the United States to discharge the duties of the United States under the second part of this paragraph in which connection he may in proper cases proclaim martial law [3] (See pp 120 121)

[1] Luther v Borden 7 How 1 (1849)
[2] Pacific States Tel and Tel Co v Ore 223 U S 118 (1912)
[3] On the power of the State executive in dealing with domestic violence see Moyer v Peabody 212 U S 78 (1909) It would seem that the President succeeds to this power when forces of the United States enter a State on its invitation to put down disorder It would seem too that the singular exploits of Governor Faubus of Arkansas at Little Rock in September 1957 (See the New York Times September 6 and ff) were grounded on the mistaken idea that the President s duty to furnish troops to a State upon its request to put down local disorder comprised the whole of the Chief Executive s power to send troops into a State Cf In re Debs 158 U.S 564 (1895)

ARTICLE V

¶The Congress whenever two thirds of both houses shall deem it necessary shall propose amendments to this Constitution or on the application of the legislatures of two thirds of the several States shall call a convention for proposing amendments which in either case shall be valid to all intents and purposes as part of this Constitution when ratified by the legislatures of three fourths of the several States or by conventions in three fourths thereof as the one or the other mode of ratification may be proposed by the Congress provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article and that no State without its consent shall be deprived of its equal suffrage in the Senate

The Amending Power

From the opinions filed in the case of Coleman v Miller[1] in 1939 in which certain questions were raised concerning the status of the proposed Child Labor Amendment (pending since 1924) it would seem that the Court today regards all questions relating to the interpretation of this article as political questions and hence as addressed *exclusively to Congress This is either because all such* questions have been in the past effectually *determined* by Congressional action or because the Court lacks adequate means of informing itself about them or because the judicial power established by the Constitution does not extend to this part of the Constitution Nevertheless certain past decisions of the Court dealing with Article V may still be usefully cited for the light shed by their statement of the actual results as well as the logical implications of *Congressional action in the past*

Political Questions

The Congress whenever both houses shall deem it necessary The necessity of amendments to the Constitution is a question to be determined by the two houses alone but not necessarily without suggestion or guidance from the President [2]

[1] 307 U S 433

[2] The National Prohibition Cases 253 U S 350 (1920) 1 Richardson *Messages and Papers* (Ed of 1909) 53 2 *ib d* 447 518 557 605 etc

Two thirds of both houses means two thirds of a quorum in both houses[3] (*See* Article I Section V ¶ 1)

Legislatures means the legislative assemblies of the States and does not include their governors far less their voters Moreover when acting upon amendments proposed by the Congress, the State legislatures and doubtless the same is true of conventions within the States—do not act as representative of the States or the populations thereof but in performance of a federal function imposed upon them by this article of the Constitution[4]

If a State legislature ratifies a proposed amendment may it later reconsider its vote the amendment not having yet received the favorable vote of three fourths of the legislatures? In Coleman v Miller this question was answered No on the basis of Congressional ruling in connection with the adoption of the fourteenth Amendment May a legislature after rejecting a proposed amendment reconsider and ratify it? On the same basis this question was answered Yes in Coleman v Miller Within one period may a proposal of amendment be effectively ratified? Within any period which Congress chooses to allow either in advance or by finding that a proposed amendment has been ratified is again the verdict of Coleman v Miller

Of the two methods here laid down for proposing amendments to the Constitution only the first has ever been resorted to and prior to the proposal to repeal the Eighteenth Amendment all proposals had been referred to the State legislatures[5] In that instance Congress prescribed that ratification should be by popularly elected conventions chosen for the purpose but left their summoning as well as other details to the several State legislatures What ordinarily resulted was a popular referendum within each State the conventions being made up almost entirely of delegates previously pledged to vote for or

[3] *Ibid* Missouri Pac R Co v Kansas 248 U S 276 (1919)

[4] Hawke v Smith 253 U S 221 (1920)

[5] It was contended in United States v Sprague 282 U S 716 (1931) that as the Eighteenth Amendment affected the liberties of the people and the rights of the State it ought to have been submitted to conventions in the States but the Court rejected the contention

against the proposed amendment[6] The term 'convention therefore it must be presumed does not today, if it ever did denote a *deliberative* body it is sufficient if it is representative of popular sentiment

Chief Justice Marshall characterised the constitution amending machinery as unwieldy and cumbrous Undoubtedly it is and the fact has had an important influence upon our institutions Especially has it favored the growth of judicial review since it has forced us to rely on the Court to keep the Constitution adapted to changing conditions What is more this machinery is *prima facie* at least highly undemocratic A proposed amendment can be added to the Constitution by 36 States containing considerably less than half of the population of the country or can be defeated by 13 States containing less than one twentieth of the population of the country

Of the two exceptions to the amending power the first is today obsolete This does not signify however that the only change that the power which amends the Constitution may not make in the Constitution is to deprive a State without its consent of its equal suffrage in the Senate The amending like all other powers organized in the Constitution is in form a delegated and hence a limited power although this does not imply necessarily that the Supreme Court is vested with authority to determine its limits The one power known to the Constitution which clearly is not limited by it is that which ordains it—in other words the original inalienable power of the people of the United States to determine their own political institutions

ARTICLE VI

¶1 All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation

[6] *See* Everett S Brown s valuable article on 'The Ratification of the Twenty first Amendment 29 *American Political Science Review* 1005 1017 (1935)

This paragraph which is now of historical interest only, was intended to put into effect the rule of International Law that when a new government takes the place of an old one it succeeds to the latter s financial obligations

The Supremacy Clause

¶2 This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United Sates shall be the supreme law of the land and the judges in every State shall be bound thereby anything in the Constitution or laws of any State to the contrary notwithstanding

This paragraph has been called the linch pin of the Constitution and very fittingly since it combines the National Government and the States into one governmental organization one Federal State

It also makes plain the fact that while the National Government is for the most part one of the enumerated powers as to its powers it is supreme over any conflicting State powers whatsoever [1] When accordingly a collision occurs between national and State law the only question to be answered is ordinarily whether the former was within a fair definition of Congress s powers Notwithstanding which the Court has at various periods proceeded on the view that the Tenth Amendment segregates to the control of the States certain subjects production for instance with the result that the power of the States over such subjects constitutes a limitation on the granted powers of Congress Obviously such a view cannot be logically reconciled with the supremacy clause (*See* Tenth Amendment pp 235*ff*)

In applying the supremacy clause to subjects which have been regulated by Congress the primary task of the Court is to ascertain whether a challenged State law is compatible with the policy expressed in the federal statute When Congress condemns an act as unlawful the extent and nature of the legal consequences of its doing so are federal questions the answers to which are to be derived from the statute and the policy thereby adopted To the federal

[1] *See* Chief Justice Marshall s famous decisions in Wheaton s Reports Vols IV VI and IX.

atute and policy conflicting State law and policy must ield[2]

So when the United States performs its functions directly hrough its own officers and employees State police regula ions clearly are inapplicable In reversing the conviction f the governor of a national soldiers home for serving leomargarine in disregard of State law the Court said hat the federal officer was not subject to the jurisdiction f the State in regard to those very matters of administra- ion which are thus approved by Federal authority[3] An mployee of the Post Office Department is not required to ubmit to examination by State authorities concerning his competence and to pay a license fee before performing his official duty in driving a motor truck for transporting the mail[4] To Arizona s complaint in a suit to enjoin the con- struction of Hoover Dam that her quasi sovereignty would be invaded by the building of the dam without first secur ing approval of the State engineer as required by its laws Justice Brandeis replied that if Congress has power to authorize the construction of the dam and reservoir Wil bur [Secretary of the Interior] is under no obligation to submit the plans and specifications to the State Engineer for approval[5]

Tax Exemption Again. Its Rise and Decline

Not only however is the Supremacy Clause important as a sort of third dimension of national power thrusting aside all conflicting State powers it is also of great sig- nificance as having been a source of private immunity particularly from State taxation Thus in the famous case of McCulloch v Maryland[6] the Court under Chief Justice Marshall held that a State might not tax an instrumental

[2] Sola Electric Co v Jefferson Electric Co 317 U S 173 176 (1942) *see also* Francis v Southern Pacific Co 333 U S 445 (1948) Testa v Katt 330 U S 386 391 (1947) Hill v Fla 325 U S 538 (1945) Amalgamated Assoc v Wis Emp Rels Bd 340 U S 383 (1951) Adams v Md 347 U S 179 (1954)

[3] Ohio v Thomas 173 U S 276 283 (1899)

[4] Johnson v Md 254 U S 51 (1920)

[5] Arizona v Calif 283 U S 423 451 (1931)

[6] 4 Wheat 316 (1819) Marshall s initial statement of the principle of national supremacy however occurs in United States v Fisher 2 Cr 358 (1805) where is asserted the priority of United States claims to debtor s assets over those of a State Spokane County v U.S 279 U S 80 87 (1929) follows this rule

ity of the National Government on its operations and it was later held that a State might not reach by a general tax national bonds national official salaries incomes from national bonds or lands owned by the National Government[7] Then in a case decided in 1928 the Court ruled that a State tax on sales of gasoline might not be validly applied in the case of sales of the commodity to the National Government for use by its Coast Guard Fleet and a Veterans Hospital[8] thus prompting the query whether a butcher who sold meat to a Congressman would be subject validly to State taxation on such sales or on the profits thereof! In recent cases however the Court has greatly curtailed the operation of the principle of tax exemption not only as a limitation on national power but as a limitation on State power also and especially in the field of income taxation Thus in 1937 it held that a State may impose an occupation tax upon an independent contractor measured by his gross receipts under contracts with the United States[9] Previously it had sustained a gross receipts tax levied in lieu of a property tax upon the operator of an automobile stage line who was engaged in carrying the mails as an independent contractor[10] and an excise tax on gasoline sold to a contractor with the Federal Government and used to operate machinery in the construction of levees in the Mississippi River[11] Subsequently it has approved State taxes on the net income of a government contractor[12] and income[13] and social security[14] taxes on the operators of bath houses maintained in a national park under a lease from the United States sales and use taxes on sales of

[7] Weston v Charleston 9 Wheat 738 (1824) Dobbins v Com's of Erie City 16 Pet 435 (1842) Pollock v Farmers L and T Co 157 U.S 429 (1895) Van Brocklin v Tenn 117 U S 151 (1886) For the most recent exemplification of this principle *see* First Federal Savings Etc v Bowers 349 U.S 143 (1955)

[8] Panhandle Oil Co v Miss 277 U.S 218 (1928) *cf* Union Pac R.R Co v Peniston 18 Wall 5 (1873)

[9] James v Dravo Contracting Co 302 U S 134 (1937)

[10] Alward v Johnson 282 U.S 509 (1931)

[11] Trinityfarm Const. Co v Grosjean 291 U.S 466 (1934)

[12] Atkinson v Tax Commission 303 U S 20 (1938)

[13] Superior Bath House Co v McCarroll 312 U.S 176 (1941)

[14] Buckstaff Bath House v McKinley 308 U.S 358 (1939)

beverages by a concessionaire in a national park [15] taxes on puchases of materials used by a contractor in the performance of a cost plus contract with the United States [16] and severance tax imposed on a contractor who served and purchased timber from lands owned by the United States [17]

Tax Exemption by Congressional Grant

But Congress is still able by virtue of the necessary and proper and supremacy clauses in conjunction to exempt instrumentalities of the National Government or private gains therefrom from State or local taxation but any person natural or corporate claiming such an exemption must ordinarily be able to point to an explicit stipulation by Congress to that effect Moreover Congress is always free to waive such exemptions when it can do so without breach of contract and any such waiver will generally be liberally construed by the Court in favor of the taxing authority [18]

In the most recent case to arise in this general field the Court was confronted with an attempt on the part of Tennessee to apply its tax on the use within the State of goods purchased elsewhere to a private contractor for the Atomic Energy Commission and to vendors of such contractors [19] This the Court held could not be done under Section 9b of the Atomic Energy Commission Act which provides in part that The Commission and the property activities and income of the Commission are hereby expressly exempted from taxation in any manner or form by any State county municipality or any subdivision thereof [20] The power of exemption said the Court stems from the power to preserve and protect functions validly authorized—the power to make all laws necessary and proper for carrying into execution the powers vested in Congress The term

[15] Collins *v* Yosemite Park & Curry Co 304 U S 518 (1938)
[16] Alabama *v* King & Boozer 314 U S 1 (1941) overruling Panhandle Oil Co *v* Knox 277 U S 218 (1928) and Graves *v* Texas Co 298 U S 393 (1936) *See also* Curry *v* U S 314 U S 14 (1941)
[17] Wilson *v* Cook 327 U S 474 (1946)
[18] Besides the leading case of Graves *v* N Y 306 U S 466 (1939) *see* such recent cases as Pittman *v* HOLC 308 U S 21 (1939) Tradesmen s National Bank *v* OKla Tax Com s n 309 U S 560 (1940) Philadelphia Co *v* Dipple 312 U S 168 (1941) and Cleveland *v* U S 323 U S 329 (1945) *Cf* Mayo *v* U S 319 U S 441 (1943)
[19] Carson *v* Roane Anderson Co 342 U S 232 (1952)
[20] Stat 765 42 U S C §1809 (b)

"activities" as used in the Act was held to be nothing less than all of the functions of the Commission.[21]

In 1928 the Court went so far as to hold that a State could not tax as income royalties for the use of a patent issued by the United States.[22] This proposition was soon overruled in Fox Film Corp. v. Doyal,[23] where a privilege tax based on gross income and applicable to royalties from copyrights was upheld. Likewise a State may lay a franchise tax on corporations measured by the net income from all sources, including income from copyright royalties.[24]

Immunity of National Official Action from State Control

It would seem elementary that a State court cannot interfere with the functioning of a federal tribunal. Nevertheless this proposition has not always gone unchallenged. Shortly before the Civil War the Supreme Court of Wisconsin, holding the federal Fugitive Slave Law invalid, ordered a United States marshal to release a prisoner who had been convicted of aiding and abetting the escape of a fugitive slave. In a further act of defiance the State court instructed its clerk to disregard and refuse obedience to the writ of error issued by the United States Supreme Court. Strongly denouncing this interference with federal authority, Chief Justice Taney held that when a State court is advised, on the return of a writ of habeas corpus, that the prisoner is in custody on authority of the United States, it can proceed no further.[25] To protect the performance of its function against interference by State tribunals, Congress may constitutionally authorize the removal to a federal court of a criminal prosecution commenced in a State court against revenue officer of the United States on account of any act done under colour of his office.[26] In the celebrated case of *In re Neagle*,[27] a United States marshal who, while assigned to protect Justice Field, killed a man

[21] 342 U.S. at 234, 236. *See also* Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954).
[22] Long v. Rockwood, 277 U.S. 142 (1928).
[23] 286 U.S. 123 (1932).
[24] Educational Films Corp. v. Ward, 282 U.S. 379 (1931).
[25] Ableman v. Booth, 21 How. 506, 523 (1859). *See also* United States v. Tarble, 13 Wall. 397 (1872). The Court's opinion in both of these cases invokes the doctrine of Dual Federalism as well as that of National Supremacy, but rather inconsistently.
[26] Tennessee v. Davis, 100 U.S. 257 (1880); *see also* Maryland v. Soper, 270 U.S. 36 (1926).
[27] 135 U.S. 1 (1890).

who had been threatening the life of the latter was charged with murder by the State of California Invoking the supremacy clause, the Supreme Court held that a person could not be guilty of a crime under State law for doing what it was his duty to do as an officer of the United States

¶3 The Senators and Representatives before mentioned and the members of the several State legislatures and all executive and judicial officers both of the United States and of the several States shall be bound by oath or affirmation to support this Constitution but no religious test shall ever be required as a qualification to any office or public trust under the United States

Congress may require no other oath of fidelity to the Constitution but it may superadd to this oath such other oath of office as its wisdom may require [28] It may not however prescribe a test oath as a qualification for holding office such an act being in effect an *ex post facto* law [29] and the same rule holds in the case of the States [30]

State Aid in National Law Enforcement

Commenting in *The Federalist* No 27 on the requirement that State officers as well as members of the State legislatures shall be bound by oath or affirmation to support this Constitution Hamilton wrote Thus the legislatures courts and magistrates of the respective members will be incorporated into the operations of the national government *as far as its just and constitutional authority extends* and will be rendered auxiliary to the enforcement of its laws The younger Pinckney had expressed the same idea on the floor of the Philadelphia Convention They [the States] are the instruments upon which the Union must frequently depend for the support and execution of their powers [31] Indeed the Constitution itself lays many duties both positive and negative upon the different organs of State government [3] and Congress may fre-

[28] McCulloch *v* Maryland 4 Wheat 316 416 (1819)

[29] *Ex parte* Garland 4 Wall 333 337 (1867)

[30] Cummings v Mo 4 Wall 277 323 (1867)

[31] 1 Farrand *Records* 404

[3] *See* Art I Sect III Par 1 Sect IV Par 1 Sect X Art II Sect I Par 2 Art III Sect II Par 2 Art IV Sects I and II Art V Amendments XIII XIV XV XVII and XIX

quently add others provided it does not require the State authorities to act outside their normal jurisdiction Early Congressional legislation contains many illustrations of such action by Congress

The Judiciary Act of 1789[33] left the State courts in sole possession of a large part of the jurisdiction over controversies between citizens of different States and in concurrent possession of the rest By other sections of the same act State courts were authorized to entertain proceedings by the United States itself to enforce penalties and forfeitures under the revenue laws while any justice of the peace or other magistrate of any of the States was authorized to cause any offender against the United States to be arrested and imprisoned or bailed under the usual mode of process Even as late as 1839 Congress authorized all pecuniary penalties and forfeitures under the laws of the United States to be sued for before any court of competent jurisdiction in the State where the cause of action arose or where the offender might be found[34] Pursuant also of the same idea of treating State governmental organs as available to the National Government for administrative purposes the act of 1793 entrusted the rendition of fugitive slaves in part to national officials and in part to State officials and the rendition of fugitives from justice from one State to another exclusively to the State executives[35] Certain later acts empowered State courts to entertain criminal prosecutions for forging paper of the Bank of the United States and for counterfeiting coin of the United States[36] while still others conferred on State judges authority to admit aliens to national citizenship and provided penalties in case such judges should utter false certificates of naturalization—provisions which are still on the statute books[37]

With the rise of the doctrine of States Rights and of the equal sovereignty of the States with the National Government the availability of the former as instruments of the

[33] 1 Stat 73 (1789) [34] 5 Stat 322 (1839)
[35] 1 Stat 302 (1793) [36] 2 Stat 404 (1806)
[37] *See* 2 Kent s *Commentaries* 64 65 (1826) 34 Stat 596 602 (1906) 8 U S C §§357 379 18 *ibid* §135 (1934) *also* Holmgren v U S 217 U S 509 (1910)

The States Rights Reaction

latter in the execution of its power came to be questioned[38] In Prigg v Pennsylvania[39] decided in 1842 the constitutionality of the provision of the act of 1793 making it the duty of State magistrates to act in the return of fugitive slaves was challenged and in Kentucky v Dennison[40] decided on the eve of the Civil War, similar objection was leveled against the provision of the same act which made it the duty of the Chief Executive of a State to render up a fugitive from justice upon the demand of the Chief Executive of the State from which the fugitive had fled The Court sustained both provisions but upon the theory that the cooperation of the State authorities was purely voluntary In the Prigg case the Court speaking by Justice Story, said state magistrates may if they choose exercise the authority [conferred by the act] unless prohibited by state legislation[41] In the Dennison case the duty of State executives in the rendition of fugitives from justice was construed to be declaratory of a "moral duty Said Chief Justice Taney for the Court We think it clear that the Federal Government under the Constitution has no power to impose on a State officer as such any duty whatever and compel him to perform it for if it possessed this power it might overload the officer with duties which would fill up all his time and disable him from performing his obligations to the State and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State[42]

Return to Earlier Views

Eighteen years later in *Ex parte* Siebold[43] the Court sustained the right of Congress under Article I Section IV paragraph 1 of the Constitution to impose duties upon State election officials in connection with a Congressional election and to prescribe additional penalties for the violation by such officials of their duties under State law The outlook of Justice Bradley s opinion for the Court is decidedly nationalistic rather than dualistic as is shown by

[38] For the development of opinion especially on the part of State courts adverse to the validity of the above mentioned legislation *see* 1 Kent s *Commentaries* 396-404 (1826)

[39] 16 Pet 539 (1842) [40] 24 How 66 (1861)

[41] 16 Pet at 622 [42] 24 How at 107 108 [43] 100 U S 371 (1880)

the answer made to the contention of counsel that the nature of sovereignty is such as to preclude the joint cooperation of two sovereigns even in a matter in which they are mutually concerned To this Justice Bradley replied As a general rule it is no doubt expedient and wise that the operations of the State and national governments should as far as practicable be conducted separately in order to avoid undue jealousies and jars and conflicts of jurisdic tion and power But there is no reason for laying this down as a rule of universal application It should never be made to override the plain and manifest dictates of the Consitu tion itself We cannot yield to such a transcendental view of State sovereignty The Constitution and laws of the United States are the supreme law of the land and to these every citizen of every State owes obedience whether in his individual or official capacity [44] Three years earlier the Court speaking also by Justice Bradley sustained a provi sion of the Bankruptcy Act of 1867 giving assignees a right to sue in State courts to recover the assets of a bankrupt Said the Court 'The statutes of the United States are as much the law of the land in any State as are those of the State and although exclusive jurisdiction for their en forcement may be given to the federal courts yet where it is not given either expressly or by necessary implication the State courts having competent jurisdiction in other re spects may be resorted to [45]

The Selective Service Act of 1917[46] was enforced to a great extent through State employees who functioned un der State supervision [47] and State officials were frequently employed by the National Government in the enforcement of National Prohibition [48] Nowadays there is constant co operation both in peacetime and in wartime in many fields between national and State officers and official bod

[44] *Ibid* 392

[45] Claflin v Houseman 93 U S 130 136 137 (1876) followed in Second Employers Liability Cases 223 U S 1 55 59 (1912)

[46] 40 Stat 76 (1917)

[47] Jane Perry Clark *The Rise of a New Federalism* 91 (Columbia University Press 1938)

[48] *see* James H rt in 13 *Virginia Law Review* 86-107 (1926) discussing President Coolidge s order of May 8 1926 for Prohibition enforcement

ies[49] This relationship obviously calls for the active fidelity of both categories of officialdom to the Constitution

A religious test is one demanding the avowal or repudiation of certain religious beliefs While no religious test may be required as a qualification for office under the United States indulgence in immoral practices claiming the sanction of religious belief such as polygamy may be made a disqualification[50] Contrariwise alleged religious beliefs or moral scruples do not furnish ground for evasion of the ordinary duties of citizenship like the payment of taxes or military service although of course Congress may of its own volition grant exemptions on such grounds The related subject of religious freedom is discussed immediately below

A Religious Test

Oath or affirmation This option was provided for the special benefit of Quakers

ARTICLE VII

¶The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same

The Articles of Confederation provided for their own amendment only by the unanimous consent of the thirteen States given through their legislatures The provision made for the going into effect of the Constitution upon its ratification by *nine* States given through *conventions* called for the purpose clearly indicates the establishment of the Constitution to have been in the legal sense an act of revolution

The Constitution an Act of Revolution

¶Done in convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty seven and of

[49] Clark *New Federalism* cited above Corwin *Court Over Constitution* 148 168 (Princeton University Press 1938)

[50] Reynolds v U S 98 U S 145 (1878) Mormon Church v U S 136 U S 1 (1890) support this proposition assuming they are still law of the land

the independence of the United States of America the twelfth In witness whereof we have hereunto subscribed our names

George Washington President and Deputy from Virginia

New Hampshire—John Langdon Nicholas Gilman

Massachusetts—Nathaniel Gorham Rufus King

Connecticut—William Samuel Johnson Roger Sherman

New York—Alexander Hamilton

New Jesery—William Livingston David Brearly William Paterson Jonathan Dayton

Pennsylvania—Benjamin Franklin Thomas Mifflin Robert Morris George Clymer Thomas Fitzsimons, Jared Ingersoll James Wilson Gouverneur Morris

Delaware—George Read Gunning Bedford Jr John Dickison Richard Bassett Jacob Broom,

Maryland—James McHenry Daniel of St Thomas Jenifer Daniel Carroll

Virginia—John Blair James Madison Jr

North Carolina—William Blount Richard Dobbs Spaight Hugh Williamson

South Carolina—John Rutledge Charles Cotesworth Pinckney Charles Pinckey Pierce Butler

Georgia—William Few Abraham Baldwin

ATTEST WILLIAM JACKSON *Secretary*

AMENDMENTS[1]

The Bill of Rights

The first ten amendments make up the so called Bill of Rights of the National Constitution They were designed to quiet the fears of mild opponents of the Constitution in its original form and were proposed to the State legislatures by the first Congress which assembled under the Constitution They bind only the National Government and in no wise limit the powers of the States of their own independent force[2] but the rights which they protect

[1] The first ten amendments were proposed in 1789 and adopted in 810 days The Eleventh Amendment was proposed in 1794 and adopted in 339 days Th Twelfth Amendment was proposed in 1803 and adopted in 229 days The Thirteenth Amendment was proposed in 1865 and adopted in 309 days The Fourteenth Amendment was proposed in 1866 and

against the National Government are nevertheless today not infrequently claimable against State authority under the Court s interpretation of the due process clause of the Fourteenth Amendment [3]

Also the efficacy of the Bill of Rights as a restriction on the National Government is confined to the territorial limits of the United States, including within that term the incorporated territories (see p 173) except when 'fundamental rights are involved it being for the Supreme Court to say what rights are fundamental in this sense [4] The right to trial by jury an inherited feature of Anglo American jurisprudence is not such a right [5] immunity from cruel and unusual punishment is [6]

AMENDMENT I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances

In the case of Gitlow v New York decided in 1925 [1] the Court while affirming a conviction for violation of a State

adopted in 768 days The Fifteenth Amendment was proposed in 1869 and adopted in 356 days The Sixteenth Amendment was proposed in 1909 and adopted in 1278 days The Seventeenth Amendment was proposed in 1912 and adopted in 359 days The Eighteenth Amendment was proposed in 1917 and adopted in 396 days The Nineteenth Amendment was proposed in 1919 and adopted in 444 days The Twentieth Amendment was proposed in 1932 and adopted in 327 days The Twenty first Amendment was proposed in 1933 and adopted in 286 days For these statistics which were compiled by Hon Everett M Dirksen of Illinois see the *New York Times* February 21 1937 Several of the Amendments were however the outcome of many years of agitation

[2] Barron v Balt 7 Pet 243 (1833) According to Mr Warren In at least twenty cases between 1877 and 1907 the Court was called upon to rule upon this point and to reaffirm Marshall s decision of 1833 The New Liberty under the Fourteenth amendment 39 *Harvard Law Review* 431 436 (1926)

[3] *See* Gitlow v N Y 268 U S 652 (1925) Near v Minn 283 U S 697 (1931) Powell v Ala 287 U S 45 (1943) Palko v Conn 302 U S 319 (1937)

[4] Downes v Bidwell 182 U S 244 (1901)

[5] Dorr v U S 195 U S 138 (1904)

[6] Weems v U S 217 U S 349 (1910)

[1] 268 U S 652 (1925)

Extension of the Freedoms of Amendment I to the States

statute prohibiting the advocacy of criminal anarchy de clared For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States [2] This dic tum became two years later accepted doctrine when the Court invalidated a State law on the ground that it abridged freedom of speech contrary to the due process clause of Amendment XIV [3] Subsequent decisions have brought the other rights safeguarded by the First Amendment freedom of religion [4] freedom of the press [5] and the right of peace able assembly [6] within the protection of the Fourteenth In consequence of this development cases dealing with the safeguarding of these rights against infringement by the States are at one or two points included in the ensuing discussion of the First Amendment and especially those arising under the establishment of religion clause

Two Views of Establishment of Religion

An establishment of religion Two theories regarding the meaning and intention of this clause have confronted each other in recent decisions of the Court According to one what the clause bans is the *preferential* treatment of any particular religion or sect by government in the United States This theory has the support of Story except for the fact that he regarded Congress as still free to prefer the Christian religion over other religions [7] It is also sup ported by Cooley in his *Principles of Constitutional Law* where it is said that the clause forbids the setting up or recognition of a state church or at least the conferring upon one church of special favors and advantages which are denied to others [8] This conception of the clause is moreover foreshadowed in the Northwest Ordinance of 1787 the third article of which reads Religion morality

Ibid 666
[2] Fiske v Kan 274 U S 380 (1927)
[3] Cantwell v Conn 310 U S 296 (1940)
[4] Near v Minn 283 U S 697 (1931)
[5] DeJonge v Ore 299 U S 353 (1937)
[6] 2 Story *Comms* §§1870-1879 (1833)
[7] Cooley *Principles* 224-225 (ed of 1898)

nd knowledge being necessary to good government and he happiness of mankind schools and the means of edu ation shall forever be encouraged [9] In short religion as uch is not excluded from the legitimate concerns of gov ernment but quite the contrary

The other theory was first voiced by Jefferson in a letter which he wrote a group of Baptists in Danbury Connecticut in 1802 Here it is asserted that it was the purpose of the First Amendment to build a wall of separation between Church and State [10] Seventy-seven years later Chief Justice Waite in speaking for the unanimou Court in the first Mormon Church case in which the right of Congress to forb d polygamy in the territories was sustained charac terized this tatement by Jefferson as almost an authoritative declaration of the scope and effect of the amend ment [11]

In the first of a series of recent cases a sharply divided Court speaking by Justice Black sustained in 1947 the right of local authorities in New Jersey to provide free transportation for children attending parochial schools [12] but accompanied its holding with these warning words which appear to have had at that time the approval of most of the Justices The establishment of religion clause of the First Amendment means at least this Neither a state nor the Federal Government can set up a church Neither can pass laws which aid one religion aid all reli gions or prefer one religion over another Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion No person can be punished for entertaining or professing religious beliefs or disbe-

[9] H S Commager (ed) *Documents of American History* 128 131 (3rd Ed 1947)

[10] Saul K. Padover (ed) *The Complete Jefferson* 518 519 (1943)

[11] Reynolds v U S 98 U S 145 164 (1879) In his 2nd Inaugural Ad dress Jefferson expressed a very diff rent and presumably more carefully consid red opinion upon the purpo e of Amendment I In matters of religion I have considered that its free exercise is placed by the Constitu tion independ nt of the powers of the general government This was said three years after the Danbury letter 1 Richardson *Messages and Papers of the Presidents* 379 (Ed of 1909)

[12] Everson v Board of Education 330 U.S 1 (1947)

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[12] Everson v Board of Education 330 U.S 1 (1947)

liefs for church attendance or non attendance No tax in any amount large or small can be levied to support any religious activities or institutions whatever they may be called or whatever form they may adopt to teach or practice religion Neither a state nor the Federal Government can openly or secretly participate in the affairs of any religious organizations or groups and *vice versa* [13] And a year later a nearly unanimous Court overturned on the above ground a released time arrangement under which the Champaign Illinois Board of Education agreed that religious instruction should be given in the local schools to pupils whose parents signed 'request cards By this plan the classes were to be conducted during regular school hours in the school building by outside teachers furnished by a religious council representing the various faiths subject to the approval or supervision of the superintendent of schools Attendance records were kept and reported to the school authorities in the same way as for other classes and pupils not attending the religious instruction classes were required to continue their regular secular studies [14] Said Justice Black speaking for the Court Here not only are the State s tax supported public school buildings used for the dissemination of religious doctrines The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State s compulsory public school machinery This is not separation of Church and State [15]

"Released Time Its ups and Downs

Justice Frankfurter presented a supplementary affirming opinion for himself and three other Justices the purport of which was that public supported education must be kept secular [16] In a dissenting opinion Justice Reed pointed out that the Congress of the United States has a chaplain for each House who daily invokes divine blessings and guidance for the proceedings The armed forces have commissioned chaplains from early days They conduct the public services in accordance with the liturgical require

[13] *Ibid* 15 16
[14] McCollum v Board of Education 333 U S 203 (1948)
[15] *Ibid* 212. [16] *Ibid* 212*ff*

ments of their respective faiths ashore and afloat employing for the purpose property belonging to the United States and dedicated to the services of religion Under the Servicemen s Readjustment Act of 1944 eligible veterans may receive training at Government expense for the ministry in denominational schools The schools of the District of Columbia have opening exercises which include a reading from the Bible without note or comment and the Lord s Prayer [17]

Justice Reed s views were not without effect In 1952 the Court six Justices to three sustained a New York City "released time program under which religious instruction must take place off the school grounds and numerous other features of the Champaign model are avoided [18] Speaking for the majority, Justice Douglas said We are a religious people whose institutions presuppose a Supreme Being We guarantee the freedom to worship as one chooses We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs it follows the best of our traditions For it then respects the religious nature of our people and accommodates the public service to their spiritual needs To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups That would be preferring those who believe in no religion over those who do believe We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence [19]

Concessions to the Religious Interest

Farther back in 1899 the Court held that an agreement between the District of Columbia and the directors of a

[17] *Ibid* 253 254 [18] Zorach v Clauson 343 U S 306 (1952)
[19] *Ibid* 313 314 JJ Black Frankfurter and Jackson dissented

hospital chartered by Congress for erection of a building and treatment of poor patients at the expense of the District was valid despite the fact that the members of the corporation belonged to a monastic order or sisterhood of a particular church [20] It has also sustained a contract made at the request of Indians to whom money was due as a matter of right under a treaty for the payment of such money by the Commissioner of Indian Affairs for the support of Indian Catholic schools [21] In 1930 the use of public funds to furnish nonsectarian textbooks to pupils in parochial schools of Louisiana was sustained,[22] and in 1947 as we have seen the use of public funds for the transportation of pupils attending such schools in New Jersey [23] In the former case the Court cited the State's interest in secular education even when conducted in religious schools in the latter its concern for the safety of school children on the highways and the National School Lunch Act [24] which aids all school children attending tax exempt schools can be similarly justified The most notable financial concession to religion however is not to be explained in this way—the universal practice of exempting religious property from taxation This unquestionably traces back to the idea expressed in the Northwest Ordinance that government has an interest in religion as such

Limitations upon the Free Exercise of Religion

Free exercise thereof The religious freedom here envisaged has two aspects It forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship and conversely it safeguards the free exercise of the chosen form of religion [25] But the free exercise thereof does not embrace actions which are in violation of social duties or subversive of good order hence it was within Congress's power to prohibit polygamy in the territories [26] So it was held in 1878 and sixty two years later

[20] Bradfield v Roberts 175 U S 291 (1899)
[21] Quick Bear v Leupp 210 U S 50 (1908)
[22] Cochran v Louisiana State Board of Education 281 U S 370 (1930)
[23] Everson v Board of Education 330 U S 1 (1947)
[24] 60 Stat 230 (1946)
[25] J Roberts for the Court in Cantwell v Conn 310 U S 296 at 303 (1940)
[26] Reynolds v U S 98 U S 145 (1878) *See also* Davis v Beason 133 U S 333 (1890) and Mormon Church v U S 136 U S 1 (1890) It was

the Court added these words of qualification to a decision setting aside a State enactment as violative of religious freedom Nothing we have said is intended even remotely to imply that under the cloak of religion persons may with impunity commit frauds upon the public [7] Yet four years later when the promoters of a religious sect whose founder had at different times indentified himself as Saint Germain Jesus George Washington and Godfre Ray King were convicted of using the mails to defraud by obtaining money on the strength of having supernaturally healed hundreds of persons they found the Court in a softned frame of mind Although the trial judge carefully discriminating between the question of the truth of defendants pretentions and that of their good faith in advancing them had charged the jury that it could pass on the latter but not the former this caution did not avail with the Court which contrived on another ground ultimately to upset the verdict of guilty The late Chief Justice Stone speaking for himself and Justice Roberts and Frankfurter dissented I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one s religious experiences —which sounds uncommonly like common sense [28]

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never intended hat the first Amendment to the Constitution could be invoked as a protection against legislation for the punishment of acts inimical to the peace good order and morals of society 133 U S at 342

[7] 310 U S at 306 (1940) Nor does the Constitution protect one in uttering obscene profane or libelous words even with pious intent Chaplinsky *v* N H 315 U S 568 (1942)

[28] United States *v* Ballard 322 U S 78 (1944) The interstate transportation of plural wives by polygamous Fundamentalists is punishable under the Mann Act Cleveland *v* U S 329 U S 14 (1946) U S Code tit. 18 §398 Nor is it a violation of religious freedom to deny conscientious objectors the right to practice law *Re* Summers 325 U S 561 (1945) Kedroff *v* St Nicholas Cathedral of the Russian Orthodox Church in N A 344 U S 94 (1952) involved a dispute between the Archbishop in New York by appointment of the Patriarch in Moscow and a corporation created by the State to take over the Church s property in New York for the benefit and use of an American separatist movement in the Orthodox Chruch The Court held that in thus attempting to regulate church administration New York had violated the free exercise of religion clause Considering the probable relationship of the Patriarch in Moscow to the political

The Blackstonian Conception of Freedom of Speech or of the Press

'Freedom of speech or of the press According to Blackstone who was the oracle of the common law when the First Amendment was framed liberty of the press consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published Every freeman he asserted has an undoubted right to lay what sentiments he pleases before the public to forbid this is to destory the freedom of the press but if he publishes what is improper mischievous and illegal he must take the consequences of his own temerity To punish (as the law does at present) any dangerous or offensive writings which when published shall on a fair and impartial trial be adjudged of a pernicious tendency is necessary for the preservation of peace and good order of government and religion the only solid foundations of civil liberty [29] Also as the law stood at that time the question whether a publication or oral utterance was of a pernicious tendency was in a criminal trial a question not for the jury but for the judge nor was the truth of the utterance a defense

The Doctrine of Seditious Libel

While it was originally no intention of the authors of Amendment I to revise the common law as set forth by Blackstone, on the subject of freedom of the press [30] there was one feature of it which early ran afoul of the facts of life in America This was the common law of seditious libel which operated to put persons in authority beyond the reach of the public criticism The first step was taken in the famous or infamous Sedition Act of 1798 which admitted the defense of truth in prosecutions brought under it and submitted the general issue of defendant s guilt to

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powers that be in that city the holding seems unrealistic Indeed the New York act set aside appears on its face to advance the free exercise by its beneficiaries of their religion which is still it is agreed that of the Orthodox Church For a sim[illegible] r controversy between branches of the Presbyterian Church which was [illegible] of on the basis of general principles of law *see* Wats[illegible] Wall 679 (1879) This occurred of course before the Court h[illegible] v Tyson (*see* p 153 ab[illegible]

the jury[31] But the substantive doctrine of seditious libel the Act of 1798 still retained a circumstance which put several critics of President Adams in jail and thereby considerably aided Jefferson's election as President in 1800 Once in office nevertheless Jefferson himself appealed to the discredited principle against partisan critics Writing his friend Governor McKean of Pennsylvania in 1803 anent such critics Jefferson said The federalists having failed in destroying freedom of the press by their gag law seem to have attacked it in an opposite direction that is by pushing its licentiousness and its lying to such a degree of prostitution as to deprive it of all credit This is a dangerous state of things and the press ought to be restored to its credibility if possible The restraints provided by the laws of the States are sufficient for this if applied And I have therefore long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses Not a general prosecution for that would look like persecution but a selected one[32]

Jefferson vs Hamilton on Freedom of Press

The sober truth is that it was that archenemy of Jefferson and of democracy Alexander Hamilton who made the greatest single contribution toward rescuing this particular freedom as a political weapon from the coils and toils of the common law and that in connection with one of Jefferson's 'selected prosecutions The reference is to Hamilton's many times quoted formula in the Croswell case in 1804 The liberty of the press is the right to publish with impunity truth, with good motives for justifiable ends though reflecting on government magistracy or individuals[33] Equipped with this brocard which is today embodied in twenty four State constitutions our State courts working in co-operation with juries whose attitude usually reflected the robustiousness of American political discussion before the Civil War gradually wrote into the common law of the States the principle of qualified privilege which

[31] These two improvements upon the common law were in fact adopted from Fox's Libel Act passed by Parliament in 1792

[32] 9 *Writings of Thomas Jefferson* 451-452 (Ford ed 1905)

[33] People v Croswell 3 Johns (N Y) 337

is a notification to plaintiffs in libel suits that if they are unlucky enough to be office holders or office seekers they must be prepared to shoulder the almost impossible burden of showing defendant s special malice [34]

Blackstone Accepted then Rejected

In 1907 the Court speaking by Justice Holmes rejected the contention that the Fourteenth Amendment rendered applicable against the States a prohibition similar to that in the First and at the same time endorsed Blackstone in words drawn from an early Massachusetts case The preliminary freedom [i e from censorship] extends as well to the false as to the true the subsequent punishment may extend to the true as to the false [35] Even as late as 1922 Justice Pitney speaking for the Court said Neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restriction about freedom of speech or the liberty of silence [36] Gitlow v New York in which this position was abandoned came three years later

The Clear and Present Danger Shibboleth

Meantime the so-called clear and present danger doctrine had made its appearance This formula lays down the requirement that before an utterance can be penalized by government it must ordinarily have occurred in such circumstances or have been of such a nature as to create a clear and present danger that it would bring about substantive evils within the power of government to prevent [37] The question whether these conditions exist is one of law for the courts and ultimately for the Supreme Court in enforcement of the First and/or the Fourteenth Amendment [38] and in exercise of its power of review in these premises the Court is entitled to review broadly findings of facts of lower courts whether State or federal [39]

[34] *See* Edward S Corwin *Liberty against Government* 157 159n (Louisiana State Univ Press 1948) Cooley *Constitutional Limitations* ch 12, Samuel A Dawson *Freedom of the Press A Study of the Doctrine of Qualified Privilege* (Columbia Univ Press 1924)

[35] Patterson v Colo 205 U S 454 461-462 (1907)

[36] Prudential Life Ins Co v Cheek 259 U S 530 543 (1922)

[37] Schenck v United States 249 U S 47 (1919)

[38] *See* Justice Brandeis concurring opinion in Whitney v Calif 274 U S 357 (1927) and cases reviewed below

[39] Fiske v Kansas 274 U S 380 (1927)

The formula emerged in the course of a decision in 1919 holding that the circulation of certain documents constituted an attempt in the sense of the Espionage Act of 1917 to cause insubordination in the armed forces and to obstruct their recruitment[40] Said Justice Holmes speaking for the Court We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights But the character of every act depends upon the circumstances in which it is done The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic It does not even protect a man from an injunction against uttering words that have all the effect of force The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent It is a question of proximity and degree [41]

Whether Justice Holmes actually intended here to add a new dimension to constitutional freedom of speech and press may be seriously questioned inasmuch as in two similar cases following shortly after in which he again spoke for the Court and in which prosecutions under the Espionage Act were sustained he did not allude to the formula[42] Moreover when a case did arise in which the formula might have made a difference seven Justices declined to follow it[43] This time however Justice Holmes accompanied by Justice Brandeis dissented on the ground that defendants utterances did not create a clear and present danger of substantive evils From this time forth in the course of the next twenty years these two Justices filed numerous opinions sometimes in dissent sometimes in affirmation of rulings of the Court in freedom of speech cases in which the clear and present danger test was

[40] Note 37 above

[41] 249 U S at 52

[42] The reference is to Frohwerk v U S 249 U S 204 *and* Debs v U S 249 U S 211

[43] Abrams v U S 250 U S 616 (1919)

urged but without convincing any of their brethren of its soundness [44] Then suddenly in 1940 the stone rejected of the builders suddenly appeared at the head of the column and along with it the further *tenet that freedom* of speech and press occupied 'a preferred position in the scale of constitutional values [4]

Clear and Present Danger Ignored

In the national field where Amendment I operates directly and without assistance from the due process clause of Amendment XIV clear and present danger has played a negligible role in defining freedom of speech and press and of religion In 1890 in Davis *v* Beason [46] a conviction for advocating polygamy was sustained without the question being raised whether there had been imminent danger of the advocacy succeeding That to be sure was fifty years before the Court s adoption of the clear and present danger doctrine But the application to new papers of the *Anti Trust Acts the National Labor Relations Act* and the Fair Labor Standards Act in 1945 1937 and 1946 *respectively was similarly unembarrassed* [47] *So also has* been that of the Hatch Acts limiting the political activities of employees of the government [48] and of legislation punishing utterances intended to obstruct recruitment of the armed services or to encourage insubordination in them [49]

Clear and present danger was first thrust forward aggressively in resistance to provisions of the Labor Management Relations (Taft Hartley) Act of 1947 which require as a condition of a union s utilizing the opportunities afforded by the act each of its officers to file an affidavit with the National Labor Relations Board (1) that he is not a

[44] *See* Schaefer *v* U S 251 U S 466 (1920) Gitlow *v* N Y 268 U S 652 (1925) Whitney *v* Calif 274 U S 357 (1927)

[45] Thornhill *v* Ala 310 U S 88 and Cantwell *v* Conn 310 U S 296 are especially referred to *Cf* Herndon *v* Lowry 301 U S 242 (1937)

[46] 133 U S 333 345 (1890) *See also* Fox *v* Wash 236 U S 273 (1915)

[47] *See* Associated Press *v* U S 326 U S 1 (1945) Associated Press *v* N L.R.B 301 U S 103 133 (1937) Oklahoma Press Pub Co *v* Walling 327 U S 186 (1946)

[48] United Public Workers *v* Mitchell 330 U S 75 (1947)

[49] Schenck *v* U S 249 U S 47 (1919) Frohwerk *v* U S 249 U S 204 (1919) Debs *v* U S 249 U.S 211 (1919) Abrams *v* U S 250 U S 616 (1919) Schaefer *v* U S 251 U S 466 (1919) Pierce *v* U S 252 U S 239 (1920) *Cf* Gilbert *v* Minn 254 U S 325 (1920) and Hartzel *v* U.S 322 U S 680 (1944)

member of the Communist Party or affiliated with such Party and (2) that he does not believe in and is not a member of nor does he support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods The statute also makes it a criminal offense to make willfully or knowingly any false statement in such an affidavit[50] In two cases decided in 1950 these provisions were sustained in one instance by an evenly divided Court[51] The main proposition of the Court as stated by the late Chief Justice Vinson was that not the relative certainly that evil conduct with result from speech in the immediate future but the extent and gravity of the substantive evil must be measured by the test laid down in the *Schenck Case* [52] In thus balancing the importance of the interest protected by legislation from harmful speech against the demands of the clear and present danger rule the Court paved the way for its decision a year later in Dennis v United States[53]

The Case of the Eleven Communists

Here the Court sustained by a vote of 7 to 2 the conviction under the Smith Act of 1940[54] of eleven leaders of the Communist Party on the charge of knowingly and willfully advocating and teaching the overthrow of government in the United States by force and violence and of willfully and knowingly conspiring to advocate and teach the same Emphasizing the substantial character of the government s interest in preventing its own overthrow by force the late Chief Justice speaking for the majority adopted the following statement from Chief Judge Learned Hand s opinion for the Circuit Court of Appeals in the same case In each case (courts) must ask whether the gravity of the evil discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger [55] This formula comments the Chief Justice is as succinct and inclusive as any other we might devise at

[50] 61 Stat 136 146 (1947)
[51] *C I O et al* v Douds 339 U S 382 (1950) Osman v Douds 339 U S 846 (1950)
[52] 339 U S 382 394 397
[53] 341 U S 494 (1951)
[54] 54 Stat 670 (1940)
[55] 341 U S at 509 citing 183 F (2nd) at 212

this time It takes into consideration those factors which we deem relevant and relates their significances More we cannot expect from words [56]

In the second place the Chief Justice emphasizes the conspiratorial nature of defendant s activities It is he declares the existence of the conspiracy which creates the danger [57] and Justice Frankfurter and Jackson also dwell upon this aspect of the case in their concurring opinions [58] while Justice Black and Douglas in their dissents significantly ignore it For if the conspiracy was a danger at all it was certainly a clear and present one in which connection it is pertinent to note that under the common law acts which when performed by a single individual are at worst private torts may become indictable when performed by a combination of persons [59]

Recently the security of the Dennis Case indeed of the Smith Act itself was gravely impaired by the holding in Yates *v* U S which was decided on June 17 1957 [60] Here petitioners who were co-defendants in the Dennis Case were arraigned under the General Conspiracy Statute (18 U S C 371) The Court held that inasmuch as the petitioners had not followed up their preachments asserting the right to overthrow government by force and violence with an effort to organise a *putsch* they must be deemed to have been propounding an abstract doctrine Indeed the Court invites a reconsideration of the Dennis holding Meantime however the Smith Act will have served to repeal all State anti sedition acts [61] In short today the right to preach the right to overthrow government by force and voilence has become a preferred right as against both national and State governments provided only that those who do the preaching do so *in abstracto*

Congressional Control of the Press

Congress s control over the newspaper press is reinforced by its control of the mails Few newspapers or periodicals can profitably circulated except locally unless they enjoy the

[56] *Ibid* [57] 341 U S at 510 511 [58] 341 U S at 542 and 572
[59] Bouvier s *Law Dictionary* 216 (Baldwin Ed N Y 1928)
[60] Advance U S Sup Ct Reports July 1 1957 pp 1356 1396
[61] Pennsylvania v Steve Nelson 350 U S 497 (1956)

second class privilege that is the privilege of specially low rates—and this privilege being a gratuity, is under the nearly absolute control of Congress notwithstanding which Congress s delegate in the matter the Postmaster General may not in carrying out Congress s expressed will that the privilege be confined to publications originated and pub lished for the dissemination of information of a public character or devoted to literature the sciences arts or some special industry' set himself up as a censor for if he does the Court will over rule him and bring his decrees to naught [6] Moreover Congress may banish from the mails altogether as well as from the channels of interstate com merce indecent fraudulent and seditious matter [63] For there can be no right to circulate what there is no right to publish circulation indeed being only an incident of pub lication Nor as we have seen is it an invasion of freedom of the press to require a newsgathering agency to treat its employees in the same way as other employers are required to treat theirs or to subject it to the anti monopoly provi sions of the Sherman Anti Trust Act [64]

Expansion of the Right of Petition

Historically the right of petition is the primary right the right peaceably to assemble a subordinate and instru mental right as if Amendment I read the right of the people peaceably to assemble *in order to* petition the government [65] Today however the right of peaceable as sembly is in the language of the Court cognate to those of free speech and free press and is equally fundamental

[It] is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions—principles which the Fourteenth Amendment embodies in the general terms of its due process clause The holding of meetings for peaceable political action cannot be proscribed Those

[6] United States *ex rel* Milwaukee Soc Dem Pub Co v Burleson 255 U S 407 (1921) and cases there cited Hannegan v Esquire Inc 327 U S 146 (1946) U S Code tit 39 §226

[63] *In re* Rapier 143 U S 110 (1892) Public Clearing House v Coyne 194 U S 497 (1904) Lewis Pub Co v Morgan 229 U S 288 (1913)

[64] Associated Press v NLRB 301 U S 103 (1937) Associated Press v U S 326 U S 1 (1945)

[65] United States v Cruikshank 92 U S 542 552 (1876)

who assist in the conduct of such meetings cannot be branded as criminals on that score The question is not as to the auspices under which the meeting is held but as to its purposes not as to the relations of the speakers but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects [66] Even so the right is not unlimited Under the common law any assemblage was unlawful which aroused the apprehensions of 'men of firm and rational minds with families and property there and it is not unlikely that the First Amendment takes this principle into account [67]

The Right to Lobby

Furthermore the right of petition too has expanded It is no longer confined to demands for a redress of grievances in any accurate meaning of these word but comprehends demands for an exercise by the government of its powers in furtherance of the interests and prosperity of the petitioners and of their views on politically contentious matters On this ground two recent decisions of lower federal courts sitting in the District of Columbia have cast doubt on the constitutionality of the Federal Regulation of Lobbying Act of 1946 under which more than 2 000 lobbyists have registered and 495 organizations report lobbying contributions and expenditures [68] In disposing of the second of these cases the Supreme Court indicated that while Congress undoubtedly possesses power to investigate the *modus operandi* of lobbying activities and their influence on public opinion such inquiries may conceivably take such a range as to encounter the prohibitions of Amendment I [69]

AMENDMENT II

A well regulated militia being necessary to the security of a

[66] De Jonge *v* Ore 299 U S 353 364-365 (1937) *See also* Hague *v* Com for Indust l Organization 307 U S 496 (1939)

[67] *See a valuable article by J M Jarrett and V A Mund* "The Right of Assembly" 9 *New York University Law Quarterly Review* 1 38 (1931) People *v* Kerrick 261 Pac Rep (Calif) 756 (1927) and State *v* Butterworth 104 N J L 579 (1928) are two modern cases on the subject which were thoroughly argued and carefully decided

[68] U S Cod tit 2 §§261 270 National Asso of Manufacturers *v McGrath 103 F Supp 510 (1952) Rumely v* U S 197 F (2nd) 166 174-175 (1952)

free state the right of the people to keep and bear arms shall not be infringed

The expression a free state is obviously here used in the generic sense and refers to the United States as a whole rather than to the several States (*see* Article I, Section VIII, ¶s 15 and 16)

Arms

The amendment does not cover concealed weapons the right to bear arms being the right simply to bear them openly Nor will the Court apply it to sawed off shot guns being unable to say of its own knowledge that their possession and use furthers in any way the preservation of a well regulated militia [1] Morever this right being a right of citizenship rather than of person may be denied aliens at least on reasonable grounds [2]

AMENDMENT III

No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in a manner to be prescribed by law

This and the following Amendment sprang from certain grievances which contributed to bring about the American Revolution They recognize the principle of the security of the dwelling which was embodied in the ancient maxim that a man s house is his castle

[69] United States v Rumely 345 U S 41 46 (1953) *See also* General Interim Report of the House Select Committee on Lobbying Activities 81st Cong 2nd Sess (United States Government Printing Office Washington 1950) *also 9 Encyclopedia of the Social Sciences 567* Lobbying For the details of J Q Adams famous fight for the right of petition in the early 1830 s *see* A C McLaughlin *A Constitutional History of the United States* 478-481 (N Y 1935)

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[1] United States v Miller 307 U S 174 (1939) sustaining the National Firearms Act of June 26 1934 (U S Code 1940 Ed tit 26 §§2720-2733) which levies a virtually prohibitive tax on the transfer of such weapons and requires their registration J McReynolds opinion for the Court in *this case contains interesting* historical *data regarding the antecedents of* Amendment II

[2] Patsone v Pa 232 U S 139 (1914) deals with a closely analogous point *See also* Presser v Ill 116 U S 252 (1886)

AMENDMENT IV

Unreasonable Searches and Seizures

The right of the people to be secure in their persons houses papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized

This Amendment reflected the abhorrence of the times against so called general warrants *from which the Colonists had suffered* more or less [1] Today it derives its chief importance from the doctrine first laid down by the Court *in 1886 in Boyd v United States*[2] *that the above provisions* must be read in conjunction with the self incrimination clause of Amendment V so that when any seizure of papers or things is unreasonable in the sense of the Fourth Amendment such papers and things may not under the Fifth Amendment be received by any federal court in evidence against the person from whom they were seized

This rule was brought into prominent notice a few years ago in connection especially with the efforts to enforce National Prohibition Some cases of seizures by United States agents operating *without search warrants* which were held at that time by the Court to be violative of the Fourth Amendment are the following The obtaining by stealth of letters from the home of an accused during his absence [3] the removal of liquors in similar circumstances from a place of business or from a garage [4] the seizure of narcotics at the home of one of several conspirators following their arrest at the home of another some distance away [5] On the other hand an officer does not have to obtain a warrant in order to search a vehicle which he has probable cause to believe is conveying things in violation of law [6] nor does the protection by the Amendment of houses ex-

[1] *Hutchinson Foundations 293 298*

[2] 116 U S 616 [3] Weeks *v* U S 232 U S *383 (1914)*

[4] Amos *v* U S 255 U S 313 (1921) Taylor *v* U S 286 U S 1 (1932)

[5] Agnello *v* U S 269 U S 20 (1925)

[6] Carroll *v* U S 267 U S 132 (1925) *See also* Brinagar *v* U S 338 U S 160 (1949) and United States *v* Di Re 332 U S 581 (1948)

Court asserted that The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed as well as weapons and other things to effect an escape from custody is not to be doubted [14] Books and papers used to carry on a criminal enterprise which are in the immediate possession and control of a person arrested for commission of an offense in the presence of the officers, may be seized when discovered in plain view during a search of the premises following the arrest [15] But the lawful arrest of persons at their place of business does not justify search of desks and files in the offices where the arrest is made and seizure of private papers found thereon [16] nor is a search which is unlawfully undertaken made valid by the evidence of crime which it brings to light [17]

In a case decided in 1947 the Court accorded the right to search as incidental to a valid arrest a considerably enlarged scope [18] The holding however was a five to four one and the year following was to all intents and purposes overruled by another five to four line up of the Justices [19] Then in 1950 the Court *appears* to have achieved the golden mean in a ruling which obtained the adherence of seven of the eight Justices participating [20] Here the search and seizure involved were held to be reasonable on the following grounds (1) they were incident to a valid arrest (2) the place of the search was a business room to which the public including the officers was invited (3) the room was small and under the immediate and complete control of respondent (4) the search did not extend

[14] 269 U S 20 30 (1925)

[15] Marron v U S 275 U.S 192 (1927)

[16] Go-Bart Importing Co v U.S 282 U.S 344 (1931) United States v Lefkowitz 285 U S 452 (1932)

[17] Byars v U.S 273 U.S 28 (1927) Johnson v United States, 333 U.S 10 16 (1948)

[18] Harris v U S 331 U.S 145 (1947)

[19] Trupiano v U S 334 U.S 699 (1948) *also* to same effect as M Donald v U S 335 U.S 451 (1949)

[20] United States v Rabinowitz 339 U.S 56 (1950)

beyond the room used for unlawful purposes (5) the possession of the forged and altered stamps was a crime just as it is a crime to possess burglars tools lottery tickets or counterfeit money [1]

Status of the Exclusionary Rule Today

As was indicated above evidence obtained in violation of Amendment IV is inadmissible against an accused in federal courts This is contrary to the practice which prevails in a majority of the States and which the Court has repeatedly approved under Amendment XIV [3] Indeed the Court has intimated recently that the federal exclusionary rule is not a command of the Fourth Amendment but merely a judicially created rule of evidence which Congress could and perhaps should overrule [4] Said Justice Frankfurter though we have interpreted the Fourth Amendment to forbid the admission of such evidence a different question would be presented if Congress under its legislative powers were to pass a statute purporting to negate the doctrine We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which in default of that judgment we have been forced to depend upon our own [5] Meantime the rule does not prevent the use of evidence unlawfully obtained by individuals [6] or by State officers [7] unless federal agents had a part in the unlawful acquisition [8] or unless the arrest and search was made for an offense punishable only by federal law [9] A search is deemed to be a search by a federal official if he had a hand in it [but not] if evidence secured by State authorities is turned over to the federal

[1] *Ibid* 64

[22] Weeks v US 232 U S 383 (1914) This case was a virtual repudiation of Adams v New York 192 U S 585 597 (1904) There the Supreme Court had ruled that in criminal proceedings in a State court the use of private papers obtained by unlawful search and seizure was no violation of the constitutional guaranty of privilege from unlawful search or seizure It added Nor do we think the accused was compelled to incriminate himself

[3] Wolf v Colo 338 U S 25 29 38 (1949) Salzburg v Md 346 U S 545 (1953) *and* Irvine v Calif 347 U S 128 (1954)

[4] 338 U.S 25 (1949) [5] *Ibid* 33

[6] Burdeau v McDowell 256 U S 465 (1921)

[27] Byars v U S 273 U S 28 33 (1927)

[28] *Ibid* 32 Lustig v U S 338 U S 74 (1949)

[29] Gambino v U S 275 U S 310 (1927)

authorities on a silver platter The decisive factor is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means [30] In short while the government must scrupulously refrain from wrong doing itself, it is permitted to profit from the derelictions of others and even circum spectly to promote them

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life liberty or property without due process of law nor shall private property be taken for public use without just compensation

Amendments IV V VI, and VIII constitute a bill of rights for accused persons For the most part they were compiled from the Bills of Rights of the early State con stitutions and in more than one respect they represented a distinct advance upon English law of that time and in deed for many years afterward

Infamous crime is one rendered so by the penalty at tached to it Any offense punishable by imprisonment or loss of civil or political privileges or hard labor is the Court has held infamous in the sense of the Constitu tion [1]

Presentment or indictment A presentment is returned upon the initiative of the grand jury and indictment is re turned upon evidence laid before that body by the public prosecutor

The grand jury here stipulated for is the grand jury as it was known to the common law and so consists of at

[30] Lusting v U S 338 U S 74 78 79 (1949)

[1] *Ex parte* Wilson 114 U S 417 (1885) United States v Moreland 258 U S 433 (1922)

least twelve and not more than twenty three persons chosen from the community by a process prescribed by law Once constituted it has large powers of investigation but its presentments or indictments must have the support of at least twelve members

The case of the Saboteurs

The land and naval forces are of course subject to military law administered through the court martial (*see* Article I Section VIII ¶14) But the exception has also a broader purpose namely to authorize the trial by court martial of the members of the armed forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts [2] The term land and naval forces includes camp followers as well as enrollees [3] but in the Case of the Saboteurs[4] who landed on our shores in June 1942 from German submarines and were later picked up in civilian dress in New York City and Chicago by the FBI the Court declined to say that it included enemy personnel who were found in disguise within our lines and so were charged with violating the laws of war The Court s position was that such cases had never been deemed to fall within the guaranties of the amendments citing in this connection Section 2 of the Act of Congress of April 10 1806 which following the Resolution of the Constitutional Congress of August 21 1776 imposed the death penalty on alien spies according to the law and usages of nations by sentence of a general court martial [5] The trial of the saboteurs by military commission was consequently held to be within the merged powers of the President and Congress but inasmuch as they were really conducting a hostile operation against the United States in a way forbidden by the laws of War it would have been reasonable to hold that they were answerable to the President simply in his capacity as

[2] *Ex parte* Quirin (The case of the Saboteurs) 317 U S 1 at 43 (July Special Term 1942)

[3] Burdick *Law of the American Constitution* 264 and cases there cited (N Y 1920)

[4] Note 2 above

[5] 317 U S at 41 The famous case of Major Andre during the Revolution was a prototype of the Case of the Saboteurs *Ibid* 31 n 9

If the jury cannot agree or if it was illegally constituted there is no trial and so no jeopardy under the clause and the same result follows where a verdict of conviction is set aside on appeal by the accused [11]

Federal Dualism and Double Jeopardy

This question arises When the same deed is an offense under two different laws may the author of the deed be tried under both laws? If one law was a national law and the other a State law then the clause since it governs only the National Government has no application [1] If however both laws were enactments of Congress then the test would be whether the two offenses are distinguishable by requiring somewhat different evidence in proof of each [13] Thus in the case referred to a drunken person who insulted a police officer in the public streets was validly prosecuted under different ordinances first for the drunkenness and then for the insult Also the clause refers only to criminal liability so that Congress may without violating it impose both a civil and a criminal sanction in respect to the same act or omission [14] But the judgment of a court martial rendered with jurisdiction is entitled to the same finality as to the issues involved as the judgment of a civil court in cases within its jurisdiction Hence a soldier of the army acquitted of a charge of homicide by a court martial of competent jurisdiction sitting in the Philippine Islands was not subsequently triable by a civil court exercising authority there [15]

Life or limb has come to mean since drawing and quartering have gone out of style life or liberty

Nor shall be compelled in any criminal case to be a witness against himself

Source of the Self Incrimination Clause

The source of this clause was the maxim that no man is

[11] United States v Perez 9 Wheat. 579 (1824) Trono v U S 199 U S 521 (1905)

[12] United States v Lanza 260 U S 377 (1922) Jerome v U S 318 U S 101 (1943)

[13] Gavieres v U S 220 U S 338 (1911) Blockenburger v U S 284 U S 299 (1932)

[14] Helvering v Mitch II 303 U S 391 (1938) United States v Hess 317 U S 537 (1943)

[15] Grafton v U S 206 U S 333 (1907) *See also* Hiatt v Brown 327 U S 1 (1946) *and* Johnson v Eisentrag r 339 U S 763 (1950)

bound to accuse himself (*nemo tenetur prodere—or accusare—seipsum*) which was brought forward in England late in the sixteenth century in protest against the inquisitorial methods of the ecclesiastical courts What the advocates of the maxim meant was merely that a person ought not to be put on trial and compelled to answer questions to his detriment unless he had first been properly accused i e by the grand jury But the idea once set going gained headway rapidly especially after 1660 when it came to have attached to it most of its present day corollaries [16]

Its Modern Application

Under the clause as it is today administered by the Supreme Court a *witness* in *any* federal proceeding whatsoever in which testimony is legally required may refuse to answer any question his answer to which might be used against him in a future criminal proceeding or which might uncover further evidence against him [17] But the witness must explicitly claim his constitutional immunity or he will be considered to have waived it[18] and he is not the final judge of the validity of his claim [19] Moreover the privilege exists solely for the protection of the witness himself and may not be claimed for the benefit of third parties [20] Nor does the clause impair the obligation of a witness to testify if a prosecution against him is barred by lapse of time by statutory enactment or by a pardon [21] the effect of a tender of pardon by the President remains uncertain [22] A witness may not refuse to answer questions on

[16] *See generally* J H Wigmore *Evidence in Trials Common Law IV* Section 2250 (2nd Ed 1923) *also* the present writer s The Supreme Court s Constitution of the Self Incrimination Clause 29 *Michigan Law Review* 1 27 195 207 (1930)

[17] McCarthy *v* Arndstein 266 U S 34 40 (1924) *See also* Boyd *v* U S 116 U S 616 (1886) Counselman *v* Hitchcock 142 U S 547 (1892) Brown *v* Walker 161 U S 591 (1896) It was on this ground that one Johnny Dio recently invoked the Fifth Amendment 140 times in the course of a two hour appearance before a Senate investigating committee The *New York Times* August 9 1957

[18] Rogers *v* U S 340 U S 367 370 (1951) United States *v* Monia 317 U S 424 427 (1943)

[19] Hoffman *v* U S 341 U S 479 486 (1951) Mason *v* U S 244 U S 362 365 (1917)

[20] Rogers *v* U S 340 U S 367 371 (1951) United States *v* Murdock 284 U S 141 148 (1931)

[21] Brown *v* Walker 161 U S 591 598 599 (1896)

[22] *Cf* Burdick *v* U S 236 U S 79 (1915) and Biddle *v* Perovich 274 U S 480 (1927)

the ground that he would thereby expose himself to prose cution by a State[23] Indeed Congress may bar State courts from convicting a person of a crime on the strength of evi dence he has given in a Congressional investigation and has done so[23a] The admission however against a defendant in a federal court of te timony given by him in a State court under a statute of immunity is valid[24] The immunity may be waived so that if an accused takes the stand in his own behalf he mu t submit to cross examination[25] while if he does not it is by no means certain that the trial judge in a federal court may not without violation of the clause draw the jury s attention to the fact[26] Neither does the amendment preclude the admission in evidence against an accused of a confession made while in the custody of officers if the confession was made freely voluntarily and without compulsion or inducement of any sort[27] But in McNabb v United State[28] the Court reversed a conviction in a fed eral court based on a confession obtained by questioning the defendants for prolonged periods in the absence of friends and counsel and without their being brought before a commissioner or judicial officer as required by law With out purporting to decide the constitution issue Justice Frankfurter s opinion urged the duty of the Court in supervising the conduct of the lower federal courts to es tablish and maintain civilized standards of procedure and evidence[29] An individual who has acquired income by il

[23] United States v Murdock 284 U S 141 149 (1931)

[23a] Adams v Md 347 U S 179 (1954) U S Code tit 18 §3846 The holding is based on the necessary and proper and supremacy clauses

[24] Feldman v U S 322 U S 487 (1944)

[25] Brown v Walker 161 U S 591 (1896) Johnson v U S 318 U S 189 (1943)

[26] *Cf* Twining v N J 211 U S 78 (1908) However a defendant in a prosecution by the United States enjoys a statutory right to have the jury instructed that his failure to testify creates no presumption against him U S Cod tit 28 §632 (Act of March 16 1878) Bruno v U S 308 U S 287 (1939) *See also* 318 U S at 196 As will be pointed out presently the immunity from self incrimination claimable under the Fourteenth Amend m nt is less extensive than that claimable under Amendment V

[27] Pierce v U S 160 U S 355 (1896) Wilson v U S 162 U S 613 (1896) United States v Mitchell 322 U S 65 (1944) [28] 318 U S 332 (1943)

[29] *Ibid* 340 In Upshaw v U S 335 U S 410 (1948) a sharply divided Court found the McNabb case inapplicable to a case in which respondent,

licit means is not excused from making out an income tax return because he might thereby expose himself to a criminal prosecution by the United States. "He could not draw a conjurer's circle around the whole matter," said Justice Holmes, "by his own declaration that to write any word upon the government blank would bring him into danger of the law."[30] But a witness called to testify before a federal grand jury as to his relations with the Communist Party cannot, in view of existing legislation touching the subject, be compelled to answer.[31] The clause does not require the exclusion of the body of an accused as evidence of his identity.[32] The introduction, however, into evidence against one who was being prosecuted by a State for illegal possession of morphine of two capsules which he had swallowed and had then been forced by the police to disgorge was held to violate due process of law.[33]

Personal Character of Immunity

The privilege of witnesses is a purely personal one, and hence may not be claimed by an agent or officer of a corporation either in its behalf or in his own behalf as regards books and papers of the corporation;[34] and the same rule holds in the case of the custodian of the records of a labor union;[35] nor does the Communist Party enjoy any immunity as to its books and records.[36] Taken in connection with the interdiction of the Fourth Amendment against unreasonable searches and seizures, the clause protects an individual from the compulsory production of private papers which would incriminate him.[37] The scope of this latter

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while under arrest for assault with intent to rape was brought by extended questioning to confess having previously committed murder in an attempt to rape.

[30] Sullivan v. U.S., 274 U.S. 259, 263, 264 (1927).

[31] Blau v. U.S., 340 U.S. 159 (1950). *See also* Blau v. U.S., 340 U.S. 332 (1951); Rogers v. U.S., 340 U.S. 367 (1951); Dennis v. U.S., 341 U.S. 494 (1951).

[32] Holt v. U.S., 218 U.S. 245 (1910).

[33] Rochin v. Calif., 342 U.S. 165 (1952). But a blood sample taken from accused while unconscious is valid evidence.

[34] Hale v. Henkel, 201 U.S. 43 (1906); Wilson v. U.S., 221 U.S. 361 (1911); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[35] United States v. White, 322 U.S. 694 (1944).

[36] Rogers v. U.S., 340 U.S. 367, 373 (1951).

[37] *See* pp. 206*ff*.

vidual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice [41] Thirty eight years later the prophecy of these words was realized in the famous Dred Scott case [42] *in which Section 8 of the Missouri* Compromise whereby slavery was excluded from the territories was held void under the Fifth Amendment not on the ground that the procedure for enforcing it was not due process of law but because the Court regarded it as unjust to forbid people to take their slaves or other property into the territories the common property of all the States

Expanded Conceptions of Liberty and Property

Meanwhile the previous year the recently established Court of Appeals of New York had in the landmark case of Wynehamer *v* People [43] set aside a state wide Prohibition law as comprising with regard to liquors in existence at the time of its going into effect an act of destruction of property not within the power of government to perform even by the forms of due process of law The term due process of law in short simply drops out of the clause which comes to read no person shall be deprived of property period And subsequently two other terms of the clause have undergone a comparable enlargement At the common law property signified ownership which was exercised in its primary and fullest sense over physical objects only *and more especially over land* [44] *Today in* Constitutional Law it covers each and all of the valuable elements of ownership and moreover has tended at times to merge with the more indefinite rights of liberty [a] Liberty at the common law meant little more than the right not to be physically distrained except for good cause Whether the cause was good or not would be inquired into

[41] B k of Columbia *v* Okely 4 Wheat 235 244 (1819) *See also* the present writer on Due Process of Law before the Civil War 24 *Harvard Law Review* 366 460 (1911) and *Higher Law Background of American Constitutional Law* (Clinton Rossiter Editor Cornell University Press (1953) C W Collins *The Fourteenth Amendment and the States* (Boston 1912) R L Mott *Due Process of Law* (Indianapolis 1926) *Willoughby on the Constitution* III chs xci cv Benjamin F Wright *The Growth of American Constitutional Law* (Boston 1942) *Carl B Swisher American Constitutional Development* (Boston 1943)

[42] Scott *v* Sandford 19 How 393 (1857) [43] 13 N Y 378 (1856)

[44] T E Holland *Elements of Jurisprudence* 211 (13th Ed Oxford 1924) 2 *Blackstone Comms* ch 1

by a court in connection with an application for a writ of *habeas corpus* or in connection with an action for damages for false imprisonment[44] About sixty years ago however the Court following the urging of influential members of the American Bar and the lead given by certain of the State courts adopted the view that the word 'liberty as used here and in the Fourteenth Amendment was intended to protect the freedom of contract' of adults engaged in the ordinary employments especially when viewed from the point of view of would be employers[45] Then in 1925 the Court took the further step of extending the term as it is used in the Fourteenth Amendment to certain of the rights described as fundamental which were already protected against the National Government by the more specific language of the Bill of Rights among these being freedom of speech and press[47] Finally more recently the Court responding to the social teachings of the New Deal has come practically to dismiss the conception of freedom of contract as a definition of liberty and to substitute for it a special concern for the rights of labor its right to organize and to strike and picket so long as too obvious violence is avoided

Quasi Legislative Power of the Court under the Clause

In brief this clause today goes to the substantive content of legislation or in other words requires that Congress exercise its powers reasonably that is to say *reasonably in the judgment of the Court* A similar requirement is laid upon the State legislatures by the Fourteenth Amendment but with two differences which potentially operate to Congress s advantage In the first place whereas the police power of the States is an indefinite power to provide for the public health safety morals and general welfare most of Congress s powers are defined by reference to a

[45] C E Shattuck The True Meaning of the term Liberty 4 *Harvard Law Review* 365 392 (1891)

[46] Allgeyer v La 165 U S 578 (1897) Holden v Hardy 169 U S 366 (1898) Lochner v N Y 198 U S 45 (1905) For the Bar s connection with thi development *see* Benjamin R Twiss *Lawyers and the Constitution How Laissez Faire Came to the Supreme Court* (Princeton University Press 1942)

[47] *See* Charles Warren The New Liberty under the Fourteenth Amendment 39 *Harvard Law Review* 431-463 *also* Gitlow v N Y 268 U S 652 (1925)

specified subject matter like post offices and post roads commerce among the States etc and this difference is sufficient to invoke in Congress s favor and against the States the rule of legal interpretation that the specific is to be preferred to the general In the second place the Fifth Amendment contains no equal protection clause although this does not signify that the Court will not pass upon the soundness of the factual justification urged in support of a specially drastic discrimination by the National Government against a particular class of its citizens as for example that which characterized its policies toward the West Coast Japanese early in World War II (*See* pp 67 68) Indeed indications are not lacking that the Court may be prepared to go further than it has in the past in condemning discrimination as a denial of due process of law Relying upon public policy and its supervisory authority over federal courts, it has in recent years reached results similar to those arrived at under the equal protection clause of the Fourteenth Amendment in refusing to enforce restrictive covenants in the District of Columbia[48] and in reversing a judgment of a Federal District Court because of the exclusion of day laborers from the jury panel[49] and in 1944 the Railway Labor Act was construed to require a collective bargaining representative to act for the benefit of all members of the craft without discrimination on account of race[50] Chief Justice Stone indicated that any other construction would raise grave constitutional doubts[51] while in a concurring opinion Justice Murphy asserted unequivocally that the act would be inconsistent with the Fifth Amendment if the bargaining agent acting under color of federal authority were permitted to discriminate against any of the persons he was authorized to represent[52] Finally the results of the Court s

[48] Hurd v Hodge 334 U S 24 (1948)
[49] Thiel v Southern Pacific Co 328 U S 217 (1946)
[50] Steele v L & N R Co 323 U S 192 (1944) [51] *Ibid* 198 199
[52] *Ibid* 208 209 *Cf* the following sentence from the concurring opinion of J Jackson in Railway Express Agency Inc v New York 336 U S 106 112 (1949) "I regard it as a salutary doctrine that cities States and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation "

recent extension of the equal protection clause to cases of discrimination based on racial grounds are available as against federal action by the due process clause of Amendment V[5a]

In another respect national and State legislation stand much more nearly on a parity with each other since in the case of both the Court is apt to have available from its own past decisions two widely different approaches to the question of the reasonableness of a challenged legislative measure and hence of its conformity with the due process of law requirement One approach is furnished by the proposition that a legislative act is presumed to be valid and deduces from this the further one that if facts *could* exist which would render the legislation before it reasonable it must be assumed by the Court that they did exist[53] The other on the contrary invokes the idea that liberty is the rule and restraint is the exception and hence demands that special justification be adduced in support of any new inroad upon previous freedom of action as almost any law is bound to be[54]

In other words under the latter rule the Court does something very like what Congress did in the first place in balancing the apparent detriments of the stature from the point of view of liberty or property as against its anticipated benefits from the point of view of public policy And it was from this approach that the Court in 1923 being then very much under the influence of *laissez faire* concepts of governmental power set aside as unreasonable and arbitrary an act of Congress establishing a minimum wage for women industrially employed in the District of Columbia[55]—a decision which it overturned in 1936[56] under the influence of the New Deal ideology[57]

[5a] *See infra* pp 268*ff*

[53] Munn v Ill 94 U S 113 132 (1876) Powell *v* Pa 127 U S 678 (1888) *See also* J Stone in United States *v* Carolene Products Co 304 U S 144 (1938)

[54] Adkins *v* Children s Hospital 261 U S 525 546

[55] The case just cited

[56] West Coast Hotel *v* Parrish 300 U S 379 (1937)

[57] *See* C B Swisher *American Constitutional Development* chs 34 and 35 (Boston 1943)

Procedural Requirements of the Clause

The requirements of due process of law in federal criminal trials are set forth in Amendment VI (See immedi ately below) In administrative proceedings which are to day an important feature of government both State and national the significance of the term has as in the case of substantive due process been elaborated by the Court Thus Congress has delegated to the Interstate Commerce Commission the power to set reasonable rates and when the Commission orders a carrier to observe a certain rate as reasonable the Court will sustain its order as having been set by due process of law provided the Commis sion did not act arbitrarily but gave the carrier an op portunity to be heard that it observed all the rules of law which the Court has laid down for such cases and finally that its findings of fact were sustained by substantial evidence 58

Judicial decisions in this field frequently turn on whether the Court regards the question before it to be one of fact and so within the power of an administrative body to de termine or one of law and so within the power of the Court to determine on review The same question (as e g whether a given rate is reasonable) may be of either sort depending on the angle from which it is viewed Nowadays the Court seems generally to treat such mixed questions as questions of fact 59

Congress of course is free at any time to add to the bare constitutional requirements of due process of law others which must be observed by administrative agencies and has done so in its Administrative Procedure Act of June 11 1946 60 It should be noted however that there are certain inherent limitations to judicial review of administrative

58 Interstate Com Com s n v Un P R R Co 222 U S 541 (1912) Inter state Com Com s n v L & N R R Co 227 U S 88 (1913) The same rules hold for more recently created administrative bodies See Consolidated Edison Co v NLRB 305 U S 197 (1938) Opp Cotton Mills v Administra tor of Wage and Hr Div etc 312 U S 126 (1941) Cf Bridges v Wixon 326 U S 135 (1945)

59 Sam cases See also John Dickinson *Administrative Justice and the Supremacy of Law* (Cambridge 1927) and Frankfurter and Davison *Cases on Administrative Law* (2nd ed Chicago 1935) Part II

60 79th Congress Public Law 404 U.S Cod tit 5 §1001 *et seq* (1946)

determinations—those which arise out of the vast bulk of facts which a regulatory agency often brings into court and those which arise from the necessity of getting a case decided State regulation of public utility rates had been at one period rendered largely farcical by the idea that the courts ought to retry from the ground up administrative findings of fact [61] Finally whatever the scope of judicial review before there is any judicial review the administrative remedy must be exhausted [62]

The requirements of due process of law in federal deportation proceedings distinguish two categories of cases If a person seeking admission claims American citizenship the decision of the administrative authorities on the claim made after a fair hearing is final [63] But if a person already residing in the United States is seized for deportation he is entitled to his day in court on a like claim [64] The deportation of a resident enemy alien may be ordered summarily under authority conferred upon the President by the Alien Enemy Act of 1798 [65]

As was indicated earlier the correction of any errors that may have been committed by a court martial in a case of which it had jurisdiction is for the military authorities alone [66] wherefore the conviction of enemy alien belligerents by authorized military tribunals cannot be tested by a writ of *habeas corpus* [67] On the other hand Congress has no right to subject a discharged serviceman to trial by court martial for offenses committed by him while in service but it may provide for his trial in a federal court of law [67a]

The Eminent Domain Power of the National Government

The power which the Government exerts when it takes private property for public use is called the power of

[61] *See* J Brandeis in St Joseph Stock yds Co v U S 298 U S 38 73 (1936) *also* Crowell v Benson 285 U S 22 (1932)

[62] Myers v Bethlehem Shipbuilding Corp 303 U S 41 (1938) Levers v Anderson 326 U S 219 (1945)

[63] United States v Ju Toy 198 U S 253 (1905) Kwock Jan Fat v White 253 U S 454 (1929) Shaughnessy v U S 345 U S 206 (1953)

[64] Ng Fung Ho v White 259 U S 276 (1922)

[65] Ludecke v Watkins 335 U S 100 (1948)

[66] Hiatt v Brown 339 U S 103 (1950)

[67] Johnson v Eisentrager 339 U S 763 (1950)

[67a] United States *ex rel* Toth v Quarles 350 U S 11 (1955) *Cf* Kinsella v Krueger 351 U S 470 (1956)

eminent domain Before the Civil War it was generally denied that the National Government could exercise the power of eminent domain within a State without the consent of the State [68] (*See* Article I Section VIII ¶17) Today however it is well settled that the National Government may take property by eminent domain whenever it is necessary and proper for it to do so in order to carry out any of the powers of the National Government and that it may in proper cases vest this power in corporations chartered by it [69]

When Property is Taken Property is taken generally speaking only when title to it is transferred to the government or the government takes over or assumes to control its valuable uses or when in the case of land it commits a deliberate and protracted trespass as by the repeated and persistent discharge of heavy guns across the grounds of a summer resort with the natural result of frightening off the public or the frequent flight at low altitudes of Army and Navy planes over a commercial chicken farm with the natural result of destroying the value of the property for that use [70] On the other hand property is not taken simply because its value declines in consequence of an exertion of lawful power by the government Thus Congress may lower the tariff cheapen the currency or declare war and so forth and so on without having to compensate those who suffer losses as a result of its action Nor is the destruction of private property by the Army to prevent its falling into enemy hands a compensable loss [71]

What is a public use? Existing precedents yield a broad definition of this term in connection with both the taxing power and the power of eminent domain when these are exercised by the States and in the case of the

[68] *See the present writer s National Supremacy* 262 263 (N Y 1913)

[69] Kohl v U S 91 U S 367 (1875) California v Pac Cent R R Co 127 U S 1 (1888) Luxton v No R Bridge Co 153 U S 525 (1894)

[70] United States v Gr t Falls M f g Co 112 U S 645 (1884) Portsmouth Harbor Land & Hotel Co v U S 260 U S 327 (1922) United States v Causby 328 U S 256 (1946) United States v Dickinson 331 U S 745 (1947)

[71] Knox v Lee 12 Wall 457 (1871) Omnia Com l Co v U S 261 U S 502 (1923) United States v Caltex 344 U S 149 (1952)

National Government determination of the issue rests with Congress unless shown to involve an impossibility [7]

Just compensation must be determined by an impartial body not necessarily a court or a jury nor necessarily in the case of land in advance of the taking so long as the owner is guaranteed the opportunity of being heard sooner or later but not too late on the question of value [73] Theoretically what the term signifies is the full and perfect equivalent in money of the property taken [4] the measure whereof is the owner s loss not the government s gain [7] More concretely where the property taken has a determinable market value in other words what a willing buyer would pay in cash to a willing seller [76] that is the measure of recovery [77] which may reflect not only the use to which property is currently devoted but also that to which it may be readily converted [8] Such is the language of the cases It cannot be said however that the Court has displayed impressive unanimity of opinion in its efforts to apply these principles in cases growing out of the facts of World War II [79]

Which Department the Clause Binds

To which branch of the National Government is the duty to render just compensation addressed? Undoubtedly to Congress since it alone has the power to appropriate

[72] Green v Frazier 253 U S 233 (1920) United States v Gettysburg Elec R Co 160 U S 668 (1896) United States *ex rel* TVA v Welch 327 U S 546 552 (1946)

[73] United States v Great Falls Mfg Co 112 U S 645 (1884) Bauman v Ross 167 U S 548 (1897) Bailey v Anderson 326 U S 203 (1945) Where land is taken by the United States under the eminent domain power without compensation proceedings the owner may under the Tucker Act bring suit for compensation in the Court of Claims or in a district court sitting as a court of claims United States v Great Falls Co above Jacobs v U S 290 U S 13 (1933)

[74] Monongahela Nav Co v U S 148 U S 312 326 (1893)

[75] United States v Chandler Dunbar Co 229 U S 53 (1913) United States *ex rel* TVA v Powelson 319 U S 266 281 (1943)

[76] United States v Miller 317 U S 369 374 (1943) *Cf* Kimball Laundry Co v U S 338 U S 1 (1949)

[77] United States v Powelson 319 U S 266 275 (1943)

[78] Boone Co v Patterson 98 U S 53 (1879) McCandless v U S 298 U S 342 (1936)

[79] *Cf* United States v Felin & Co 334 U S 624 (1948) United States v Cors 337 U S 325 333 (1949) United States v Toronto Nav Co 338 U S 396 (1949) United States v Commodities Trading Corp 339 U S 121 (1950)

moneys for the purpose But this does not imply that Congress must in all instances have authorized the taking in the first place Thus in passing upon a seizure of American owned property by an American military commander operating in Mexico during the Mexican War the Court said that if the exigencies of war clearly warranted the act the Government was bound to make full compensation but the officer is not a trespasser [80] doctrine which it reiterated years later with respect to a similar taking in the course of the Civil War [81]

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense

The Constitutional Requisites of Trial by Jury

Such trial is by a jury of twelve who e verdict of guilty or not guilty must be unanimous to convict or acquit [1] At the common law the court was judge of the law and the jury was judge of the facts nor could either call the other to account for its determinations within its proper sphere [2] In actual practice nevertheless the judge had great freedom in advising the jury as to the merits of a case the weight of the evidence the reliability of witnesses and so on [3] And while this feature of jury trial too is an element of the institution as it is embodied in the

[80] Mitchell v Harmony 13 How 115 (1852)
[81] United States v Russell 13 Wall 623 (1871) *See also* note 70 above and United States v Pewee Coal Co 341 U S 114 (1951)

[1] Maxwell v Dow 176 U S 581 (1900) For the history of the jury *see* J B Thayer *Preliminary Treatise on Evidence* ch 2 (Boston 1898) A W Scott *Fundamentals of Procedure* ch 3 (New York 1922)

[2] Coke Co *Lit* 155b Bushell s Case (1670) Thayer *op cit* 166-169

[3] *Ibid* ch 3 *passim* Thayer declares it impossible to conceive of jury trial existing at any stage of English history in a form that would without from the jury the assistance of the court in dealing with facts Trial by jury in such a form as that is not trial by jury in any historic

Constitution a federal judge must always make it clear to the jury that the final determination of all matters of fact rests with the latter and that his remarks on such matters are advisory only[4] The right to trial by jury may be waived as to any offense[5] while except by allowance of Congress it does not extend to petty offenses[6] The right is claimable in the District of Columbia[7] and in incorporated territories[8] but being a right rooted in Anglo American jurisprudence rather than a fundamental right[9] it is not claimable without specific donation by Congress in unincorporated' territories[10] Nor is it claimable by American citizens residing or temporarily sojourning abroad wherefore laws enacted to carry into effect treaties granting extraterritorial rights were not rendered unconstitutional by the fact that they did not secure to an accused the right to trial by jury[11]

A speedy trial means a reasonably speedy trial and the right to it may be secured by the writ of *habeas corpus* Public trial does not mean one which takes place under the eye of the movie camera nor even one to which the public at large is admitted It is enough if representatives of the public and especially friends of the prisoner are admitted in order to see that justice is done

An impartial jury must ordinarily represent a cross-section of the community but it does not have to contain representatives of the class to which a defendant belongs In implementing the Fourteenth Amendment Congress has enacted only that no person shall be disqualified for jury service on account of race color or previous condi-

sense of the words *Ibid* 188n 'The jury works well in England because the bench is stronger than the bar W S Holdsworth *Some Lessons from Our Legal History* 85 (New York 1928)

[4] Quercia v U S 289 U S 466 (1933) *See also* Glasser v U S 315 U S 60 (1942) for an informative opinion touching several constitutional aspects of a criminal trial in a federal court

[5] Patton v U S 281 U S 276 (1930)

[6] Schick v U S 195 U S 65 (1904)

[7] Callan v Wilson 127 U S 540 (1888)

[8] Rasmussen v U S 197 U S 516 (1905)

[9] Twining v N J 211 U S 78 (1908)

[10] Balzac v Porto Rico 258 U S 298 304 305 (1922)

[11] *In re* Ross 140 U S 453 464 (1891)

tion of servitude and the Court has expressed its extreme reluctance to amend this statute[12]

State and district The jury must be drawn from the vicinage of the crime it being assumed that this will ordinarily be the residence of the accused, who will thus be guaranteed a trial by his neighbors But in modern conditions the vicinage of the crime may run over and beyond the boundaries of several States while persons charged with conspiring to violate the laws of the United States or to defraud the National Government may be dragged to the remotest parts of the Union on account of something done there by somebody else[13] Moreover for offenses against federal laws not committed within any State Congress has the sole power to prescribe the place of trial such an offense is not local and may be tried at such place as Congress may designate[14]

Indefinite Charges and Illegal Presumptions

Nature and cause of the accusation That is to say the law must furnish a reasonably definite standard of guilt[15] Applying the sense of this requirement in interpretation of the "due process" clause of the Fourteenth Amendment the Court in 1939 set aside a New Jersey statute which penalized "gangsters" but later upheld a Minnesota statute which authorized proceedings against "psychopathic personalities" In the latter case the material term had been closely defined by judicial interpretation in the former it had not[16] Statutes prohibiting the coercion of employers to hire unneeded employees[17] establishing minimum wages and maximum hours of service for persons engaged in the production of goods for interstate commerce[18] or forbidding "undue" or "unreasonable" restraints of trade[19] have been held to be sufficiently definite to be

[12] Fay v N Y 322 U S 261 283 284 (1947) *See also* United States v Wood 299 U S 123 (1936) *also* Hernandez v Texas 347 U S 475 (1954)

[13] *See* United States v Johnson 323 U S 273 (1944) U S Code tit 18 §88 *and* J Holmes dissenting in Hyde v U S 225 U S 347 at 384 (1913)

[14] Jones v U S 137 U S 202 211 (1890) United States v Johnson, above

[15] United States v Cohen Grocery Co 255 U S 81 (1921)

[16] Lanzetta v N J 306 U S 451 (1939) Minnesota v Probate Court 309 U S 270 (1940)

[17] United States v Petrillo 332 U S 1 (1947)

[18] United States v Darby 312 U S 100 125 (1941)

[19] Nash v U S, 229 U S 373 (1913)

constitutional Nor is a provision of the Immigration Act[20] which makes it a felony for an alien against whom a specified order of deportation is pending to willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, void on its face for indefiniteness[21]

Recently a very difficult aspect of this problem was presented but not definitely settled in Screws *v* United States[2] There State law enforcement officers had been convicted of violating Section 20 of the Federal Criminal Code which makes it an offense against the United States for anyone acting under colour of any law willfully to deprive anyone of rights secured by the Constitution of the United States[23] The indictment charged that in beating to death a man whom they had just arrested these officers had deprived him of life without due process of law The defendant claimed that the statute thus applied was unconstitutional because due process of law was too vague a concept to supply an ascertainable standard of guilt A narrow majority of the Court ordered the case to be retried on a closer construction of the statute Subsequently in Williams *v* United States[4] it was held again by a sharply divided Court that Section 20 did not err for vagueness where the indictment made it clear that the constitutional right violated by the defendant was immunity from the use of force and violence to obtain a confession and this meaning was also made clear by the trial judge s charge to the jury[25]

Confrontation While the criminal law often permits the evidence offered against a defendant to be supplemented

[20] U S Code tit 8 §156(c)

[1] United States *v* Spector 343 U S 169 (1952)

[2] 325 U S 91 (1945) [23] U S Code tit 18 §242

[4] 341 U S 97 *(1951)* *See also* Koehler *et al v* U S 342 U S 852 (1951)

[5] As to what a defendant is entitled to expect of an indictment in the way of informing him of the nature of his offense *see* United States *v* Cruikshank 92 U S 542 544 558 *(1876)* Burton *v* U S 202 U S 344 (1906) Potter *v* U S 155 U S 438 444 (1894) Rosen *v* U S 161 U S 29 40 *(1896)* The Constitution does not require the Government to furnish a copy of the indictment to an accused United States *v* Van Duzee 140 U S 169 173 (1891) A conviction based on a forced confession is of course invalid *see* Herman *v* Claudy 350 U S 116 (1956)

by presumptions to be valid, however, there must always be a rational connection between the facts proved and the fact presumed, a matter as to which the Supreme Court is the final judge under the due process clause. Thus it was reasonable for Congress to require that a defendant discovered to be in the possession of opium should assume the burden of proving that he had not obtained it through illegal importation.[26] Conversely, there was no such rational connection between the possession of a firearm by a person who had been previously convicted of a crime of violence and the presumption that he had obtained the firearm in violation of the Firearms Act.[27] And recently the Court held in a much discussed case in which F.B.I. reports furnished some of the evidence against an accused, that if the government exercised its privileges to withhold the reports in the public interest the criminal action must be dismissed.[27a] At present a Congressional committee is endeavoring to draught legislation designed to reconcile an accused's right "to be confronted with the witnesses against him" with the right of the government to prevent the evisceration of F.B.I. files.

Compulsory process for obtaining witnesses. This right yields to the right of the National Government to protect its military secrets.[27b]

"Assistance of Counsel." By virtue of this provision counsel must be furnished to an indigent defendant in a federal court in every case, whatever the circumstances. Prosecutions in State courts are not subject to this fixed requirement.[28] The right to counsel was held to have been violated where, over defendant's objection, the Court required his counsel to represent a co-defendant whose interest was possibly inimical to his;[29] likewise where a trial

[26] Yee Hem v. U.S., 268 U.S. 178 (1925).

[27] Tot v. U.S., 319 U.S. 463 (1943); cf. U.S. Code, tit. 15, §902 (f). For State penal legislation held to embody presumptions of guilt which violated the due process clause of Amendment XIV, see 279 U.S. 1 and 639 (1929) and 344 U.S. 183 (1952).

[27a] Jencks v. U.S., decided June 3, 1957.

[27b] United States v. Reynolds, 345 U.S. 1 (1953).

[28] Foster v. Ill., 332 U.S. 134 (1947).

[29] Glasser v. U.S., 315 U.S. 60 (1942).

judge decided without notice to defendant and in his absence that the latter had consented to be represented by counsel who also represented another defendant in the same case[30] The right may be waived by one whose education qualifies him to make an intelligent choice[31] The relation between an accused and his counsel is a confidential one and communications between them may not be divulged in court[32]

AMENDMENT VII

In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re examined in any court of the United States than according to the rules of the common law

Suits at Common Law

The primary purpose of this amendment was to preserve the historic line separating the province of the jury from that of the judge in civil cases without at the same time preventing procedural improvements which did not transgress this line Elucidating this formula the Court has achieved the following results It is constitutional for a federal judge in the course of trial to express his opinion upon the facts provided all questions of fact are ultimately submitted to the jury[1] to call the jury s attention to parts of the evidence he deems of special importance[2] being careful to distinguish between matters of law and matters of opinion in relation thereto[3] to inform the jury when there is not sufficient evidence to justify a verdict that such

[30] United States v Hayman 342 U S 205 (1952) Other recent cases illustrative of the right to counsel are Chandler v Freytag 348 U S 3 (1954) Massey v Moore 348 U S 105 (1954) and Griffin *et al* v Illinois 351 U S 12 (1956)

[31] Adams v U S 317 U S 269 (1942) [32] Cooley *Principles* 319 324

[1] Vicksburg & Railroad Co v Putnam, 118 U S 545 553 (1886) United States v Reading Railroad 123 U S 113 114 (1887)

118 U S 545 where are cited *Carver v Jackson ex dem Astor et al* 4 Pet 1 80 (1830) Magniac v Thompson 7 Pet 348 390 (1833) Mitchell v Harmony 13 How 115 131 (1852) Transportation Line v Hope 95 U S 297 302 (1877)

[3] Games v Dunn 14 Pet 322 327 (1840)

[4] Sparf v U S 156 U S 51 99 100 (1895) Pleasants v Fant 22 Wall 116 121 (1875) Randall v Baltimore & Ohio R R Co 109 U S 478 482

is the case[4] to direct the jury after plaintiff's case is all in to return a verdict for the defendant on the ground of the insufficiency of the evidence[5] to set aside a verdict which in his opinion is against the law of the evidence and order a new trial[6] to refuse defendant a new trial on the condition, accepted by plaintiff that the latter remit a portion of the damages awarded him[7] but not on the other hand to deny plaintiff a new trial on the converse condition although defendant accepted it[8] From this point on, the line is not always easy to trace In general the Court has held that federal courts of appeal must remand for retrial cases in which they reverse the verdict of a lower court and may not substitute a judgment of their own on the merits although more recent cases somewhat mitigate this rule which obviously favors the law's delay[9]

Limited Application of the Amendment

The amendment governs only courts which sit under the authority of the United States[10] including courts in the territories and the District of Columbia[11] It does not apply to a State court even when it is enforcing a right created by federal statute[12] Materially it is limited to rights and remedies peculiarly legal in their nature[13] the term common law being used in contradistinction to suits in which equitable rights alone were recognized at the time of the

(1883) Meehan v Valentine 145 U S 611 625 (1892) Coughran v Bigelow 164 U S 301 (1896)

[5] Treat Mfg Co v Standard Steel & Iron Co 157 U S 674 (1895) Randall v Baltimore & Ohio R R Co 109 U S 478 482 (1883) and cases there cited

[6] Capital Traction Co v Hof 174 U S 1 13 (1899)

Arkansas Land & Cattle Co v Mann 130 U S 69 74 (1889)

[8] Dimick v Schiedt 293 U S 474 476-478 (1935)

[9] Slocum v N Y Life Ins Co 228 U S 364 (1913) Dimick v Schiedt above Baltimore & Co Line v Redman 295 U S 654 (1935)

[10] Pearson v Yewdall 95 U S 294 296 (1877) *See also* Edwards v Elliott 21 Wall 532 557 (1874) Justices v U S *ex rel* Murry 9 Wall 274 277 (1870) Walker v Sauvinet 92 U S 90 (1870) St Louis & K C Land Co v Kansas City 241 U S 419 (1916)

[11] Webster v Reid 11 How 437 460 (1851) Kennon v Gilmer 131 U S 22 28 (1889)

[12] Minneapolis & St L R Co v Bombolis 241 U S 211 (1916) which involved the Federal Employers Liability Act of 1908 The ruling is followed in four other cases in the same volume *See ibid* 241 261 485 and 494

[13] Shields v Thomas 18 How 253 262 (1856)

framing of the amendment[14] Nor does it apply to cases in admiralty and maritime jurisdiction in which the trial is by a court without a jury[15] nor to suits to enforce claims against the United States[16] nor to suits to cancel a naturalization certificates for fraud[17] to orders of deportation of an alien[18] to suits under the Longshoremen s and Harbor Workers Compensation Act[19] In short the Court in its application of the amendment has followed the historic pattern of the common law

AMENDMENT VIII

Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted

The Supreme Court has had little to say with reference to excessive fines or bail *In an early case it held that it had* no appellate jurisdiction to revise the sentence of an inferior court even though the excessiveness of the fine was apparent on the face of the record[1] Nearly one hundred and twenty years later however it ruled that bail must not be excessive that its purpose was to make reasonably sure of a defendant s appearance for trial but not so heavy that he could not give it and thereby secure his liberty for the purpose of preparing his defense[1a]

Cruel and Unusual Punishments

The ban against cruel and unusual punishments has received somewhat greater attention In Wilkerson v Utah[2] the Court observed that difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual

[14] Parsons v Bedford 3 Pet 433 447 (1830) Barton v Barbour 104 U S 126 133 (1881)
[15] Parsons v Bedford above Waring v Clarke 5 How 441 460 (1847) *See also* The Sarah 8 Wheat 390 391 (1823) and cases there cited
[16] M Elrath v U S 102 U S 426 440 (1880) *See also* Galloway v U S 319 U S 372 388 (1943)
[17] Luria v U S 231 U S 927 (1914)
[18] Gee Wah Lee v U S 25 F (2nd) 107 (1928) certiorari denied 277 U S 608 (1928) Tiler & S Co Diamond Iron Works 270 Fed 4?9 (1921) *certiorari* denied 256 U S 691 (1921)
[19] Crowell v Benson 285 U.S 22 45 (1932)

[1] *Ex parte* Watkins 7 Pet 568 574 (1832)
[1a] Stack v Boyle 342 U S 1 (1951)
[2] 99 U.S 130 (1879)

punishments shall not be inflicted but that it was safe to affirm that punishment of torture and all others in the same line of unnecessary cruelty are forbidden by that Amendment [3] but that shooting as a mode of executing the death penalty was not cruel and unusual within the intention of the amendment Thirty years later a divided court condemned a Philippine statute prescribing *fine and imprisonment of from twelve to twenty years for* entering a known false statement in a public record on the ground that the gross disparity between this punishment and that imposed for other more serious offenses made it cruel and unusual and as such repugnant to the Bill of Rights [4] But no constitutional infirmity was discovered in a measure punishing as a separate offense each act of placing a letter in the mails in pursuance of a single scheme te defraud [5] Nor was it cruel and unusual punishment in the opinion of a divided Court, to subject one convicted of murder to electrocution after an accidental failure of equipment had rendered a previous attempt unsuccessful [6]

AMENDMENT IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people

Rights Anterior to the Constitution

In other words there are certain rights of so fundamental a character that no free government may trespass upon them whether they are enumerated in the Constitution or not [1] In point of fact the course of our constitutional development has been to reduce fundamental rights to rights guaranteed by the sovereign from the natural rights that

[3] *Ibid* 135 [4] Weems *v* US 217 U S 349 371 389 (1910)
[5] Donaldson *v* Read Magazine 333 U S 178 191 (1948)
[6] Louisiana *v* Resweber 329 U S 459 (1947)

[1] *See* the language of J Chase in Calder *v* Bull 3 Dall 386 387 389 (1798) *also* of J Miller for the Court in Savings and Loan Asso *v* Topeka 20 Wall 655 662 663 (1874) We accept appellant s contention that the nature of political rights reserved to the people by the Ninth and Tenth Am ndments are *[sic]* involved The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views J Reed for the Court in United Public Workers *v* Mitchell 330 U S 75 94-95 (1947)

they once were—a development reflected especially in the history of the due process of law clause

AMENDMENT X

The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people

Reserved Rights of the States versus National Supremacy

The Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted that powers not granted to the United States were reserved to the States or to the people It added nothing to the instrument as originally ratified [1] That this provision was not conceived to be a yardstick for measuring the powers granted to the Federal Government or reserved to the States was clearly indicated by its sponsor James Madison in the course of the debate which took place while the amendment was pending concerning Hamilton s proposal to establish a national bank He declared that Interference with the powers of the States was no constitutional criterion of the power of Congress If the power was not given Congress could not exercise it if given they might exercise it although it should interfere with the laws or even the Constitutions of the States [2] Nevertheless for approximately a century from the death of Marshall until 1937 the Tenth Amendment was frequently invoked to curtail powers expressly granted to Congress notably the powers to regulate interstate commerce to enforce the Fourteenth Amendment and to lay and collect taxes

The first and logically the strongest effort to set up the Tenth Amendment as a limitation on federal power was directed to the expansion of that power by virtue of the necessary and proper clause In McCulloch v Maryland [3] the Attorney General of Maryland cited the charges made by the enemies of the Constitution that it contained a vast variety of powers lurking under the generality of its

[1] United States v Sprague 282 U S 716 733 (1931)

[2] II Annals of Congress col 1897 (1791)

[3] 4 Wheat 316 (1819)

phraseology which would prove highly dange ous to the liberties of the people and the rights of the states and he cited the adoption of the Tenth Amendment to allay these apprehensions in support of his contention that the power to create corporations was reserved by that amendment to the States[4] Stressing the fact that this amendment unlike the cognate section of the Articles of Confederation omitted the word expressly as a qualification of the powers granted to the National Government Chief Justice Marshall declared that its effect was to leave the question whether the particular power which may become the subject of contest has been delegated to the one government or prohibited to the other to depend upon a fair construction of the whole instrument[5]

The States Rights Bench which followed Marshall took a different view and from that time forth for a full century the Court proceeded at discretion on the theory that the amendment withdrew various matters of internal police from the rightful reach of power committed to Congress This view which elevated the Court to the position of a quasi arbitral body standing over and above two competing sovereignties was initially invoked in behalf of the constitutionality of certain State acts which were alleged to have invaded the national field[6] Not until after the Civil War was the idea that the reserved powers of the States comprise an independent qualification of otherwise constitutional acts of the Federal Government actually applied to nullify in part an act of Congress This result was first reached in a tax case—Collector v Day[7] Holding that a national income tax in itself valid could not be constitutionally levied upon the official salaries of State officers Justice Nelson made the sweeping statement that The States within the limits of their powers not granted or in the language of the Tenth Amendment reserved are as independent of the general government as that government

[4] 4 Wheat 372 (1819) [5] Ibid 406

[6] See especially New York v Miln 11 Pet 102 (1837) License Cases 5 How 504 573 574 (1847)

[7] 11 Wall 113 (1871)

within its sphere is independent of the States [8] In 1939 Collector v Day was expressly overruled [9]

Outside the field of taxation the Court proceeded more hesitantly A year before Collector v Day it held invalid except as applied in the District of Columbia and other areas over which Congress has exclusive authority a federal statute penalizing the sale of dangerous illuminating oils [10] It did not however refer to the Tenth Amendment In stead it asserted that the express grant of power to regulate commerce among the States has alway been un derstood as limited by its terms and as a virtual denial of any power to interfere with the internal trade and business of the separate States except indeed as a necessary and proper means for carrying into execution some other power expressly granted or vested [11] Similarly in the Employers Liability cases [12] an act of Congress making every carrier engaged in interstate commerce liable to any employee including those whose activities related solely to interstate activities for injuries caused by negligence was held un constitutional by a closely divided court without explicit reliance on the Tenth Amendment At last however in the famous case of Hammer v Dagenhart [13] a narrow major ity of the Court amended the amendment by inserting the word expressly before the word delegated and on this basis ruled that an act of Congress which prohibited the transportation of child made goods in interstate commerce was not a regulation of commerce among the States but an invasion of the reserved powers of the States

Judicial Amendment of the Tenth Amendment

During the twenty years following this deci ion a variety of measures designed to regulate economic activities di rectly or indirectly were held void on similar grounds Excise taxes on the profits of factories in which child labor was employed [14] on the sale of grain futures on markets

[8] 11 Wall 124 (1871) [9] Graves v O Keefe 306 U S 466 (1939)
[10] United States v Dewitt, 9 Wall 41 (1870) [11] *Ibid* 44
[12] 207 U S 463 (1908) *See also* Keller v U.S 213 U S 138 (1909)
[13] 247 U S 251 (1918)
[14] Bailey v Drexel Furniture Co 259 U.S 20 36 38 (1922)

which failed to comply with federal regulations [15] on the sale of coal produced by non members of a coal code established as a part of a federal regulatory scheme [16] and a tax on the processing of agricultural products the proceeds of which were paid to farmers who complied with production limitations imposed by the Federal Government [17] were all found to invade the reserved powers of the States And in Schechter Poultry Corporation *v* United States[18] the Court, holding that the commerce power did not extend to local sales of poultry brought from without the State invoked the amendment in support of the proposition that Congress could not regulate local matters which affected interstate commerce only indirectly The maintenance of this rule said Chief Justice Hughes was essential to the maintenance of the federal system itself [19]

On the other hand both before and after Hammer *v* Dagenhart the Court sustained federal laws penalizing the *interstate transportation of lottery tickets* [20] *of women for* immoral purposes [1] of stolen automobiles of tick infested cattle [3] of prison made goods [4] Thus with some sacrifice of consistency it still has managed to be always on the side of the angels

Triumph of the Supremacy Clause

At last in 1941 the Court came full circle in its exposition of Amendment X Having returned to the position of John Marshall four years earlier when it sustained the Social Security [25] and National Labour Relations Acts [26] it explicitly restated Marshall s thesis in upholding the Fair Labor Standards Act in United States *v* Darby [7] Speaking

[15] Hill *v* Wallace 259 U S 44 (1922) *See also* Trusler *v* Crooks 269 U S 475 (1926)
[16] *Carter v Carter Coal Co 298 U S 238 (1936)*
[17] United States *v* Butler 297 U S 1 (1936)
[18] 295 U S 495 (1935) [19] *Ibid* 529
[0] Champion *v* Ames 188 U S 321 (1903)
[1] Hoke *v* U S 227 U S 308 (1913)
Brooks *v* U S 267 U S 432 (1925)
[23] Thornton *v* U S 271 U S 414 (1926)
[4] Kentucky Whip & Collar Co *v* Illinois C R Co 299 U.S 334 (1937)
[25] Steward Machine Co *v* Davis 301 U S 548 (1937) Helvering *v* Davis 301 U S 619 (1937)
[26] National Labour Relations Board *v* Jones & Laughlin Steel Corp 301 U S 1 (1937)
[7] 312 U S 100 (1941) *See also* United States *v* Carolene Products Co 304 U S 144 147 (1938) Case *v* Bowles 327 U S 92 101 (1946)

for a unanimous court Chief Justice Stone wrote The power of Congress over interstate commerce is complete in itself may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the Constitution That power can neither be enlarged nor diminished by the exercise or non exercise of state power

It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of states *Our conclusion is unaffected by the* Tenth Amendment which states but a truism that all is retained which has not been surrendered [28] Hammer v Dagenhart was expressly overruled [29]

Today it is apparent that the Tenth Amendment does not shield the States nor their political Subdivisions from the impact of any authority affirmatively granted to the Federal Government It was cited to no avail in Case v Bowles [30] where a State officer was forbidden to sell timber on school lands at a price in excess of the maximum prescribed by the Office of Price Administration and when California violated the Federal Safety Appliance Act in the operation of the State Belt Railroad as a common carrier in interstate commerce it was held liable for the satutory penalty [31] Years earlier indeed the Sanitary District of Chicago was enjoyed at the suit of the Attorney General of the United States from diverting water from Lake Michigan in exces of a specified amount On behalf of a unanimous court Justice Holmes wrote This is not a controversy among equals The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction There is no question that this power is superior to that of the States to provide for the welfare or necessities of their inhabitants [32] Similarly under its superior power of eminent

[28] 312 U S 100 114 123 124 (1941) *See also* Fernandez v Wiener 326 U S 340 362 (1945)
[29] 312 U S at 116-117
[30] 327 U S 92 102 (1946)
[31] United States v Calif 297 U S 175 (1936)
[32] Sanitary District of Chicago v U S 266 U S 405 425 426 (1925)

domain the United States may condemn land owned by a State even where the taking will interfere with the State's own project for water development and conservation[33] Nor are rights reserved to the States invaded by a statute which requires a reduction in the amount of a federal grant in aid of the construction of highways upon failure of a State to remove from office a member of the State Highway Commission found to have violated federal law by participating in a political campaign[34]

United States means primarily the political branches of the National Government but the term may be comprehensive enough to include any authority which was created by and which rests upon the Constitution as for instance the power of amending it (*see* Article V)

The States in International Law

States means the State governments and the people of the States and sometimes the States territorially Recently a case decided by the Supreme Court raised the question whether the National Government or the coastal States held title to the oil lands underlying coastal submerged lands between low water mark and the three mile limit Numerous judicial dicta favored the State claim but fundamental principle was on the side of the United States and the Court held with the latter By International Law, sovereignty which includes paramount ownership over tide water lands is an attribute of nationality and so far as International Law is concerned the States do not exist[35]

The people means the people of the United States as constituting one sovereign political community that is the same people who ordained and established the Constitution (*see* Preamble)

AMENDMENT XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prose

[33] Oklahoma v Atkinson Co 313 U S 508 534 (1941)

[34] Oklahoma v U S Civil Service Commission 330 U S 127 142 144 (1947) *See also* Adams v Md decided March 8 1954 (p 213 above)

[35] *See* Holmes v Jennison 14 Pet 540 573 576 (1840) United States v Calif 332 U S 19 (1947) *Cf* Skiriotec v Fla 313 U S 69 78-79 (1941)

cuted against one of the United State by citizens of another State or by citizens or subjects of any foreign State The action of the Supreme Court in accepting jurisdiction of a suit against a State by a citizen of another State in 1793, in Chisholm *v* Georgia[1] provoked such angry reactions in Georgia and such anxieties in other States that at the first meeting of the Congress after this decision what became the Eleventh Amendment was proposed by an overwhelming vote and ratified with vehement speed[2] The protection afforded the States by the amendment against suits for debt extends however not only to tho e instituted by citizens of another State or the citizens or subjects of a foreign State but also those brought by the State s own citizens or by a foreign state[3]

State Official Immunity

Otherwise the amendment has proved comparatively in effective as a protection of State Rights against federal judicial power For one thing a suit is not commenced or prosecuted against a State by the appeal of a case which was instituted by the State itself against a defendant who claims rights under the Constitution or laws or treaties of the United States[4] (*see* Article III Section II ¶1) Nor may an officer of a State who is acting in violation of rights protected by the Constitution or laws or treaties of the United States claim the protection of the amendment in asmuch as in so acting he loses his official and representa tive capacity[5] Indeed nowadays the amendment does not forbid the federal courts from enjoining temporarily a State official from undertaking to enforce a State statute al leged to be unconstitutional until it has been determined finally whether the statute is constitutional or not[6]

On the other hand suits against the officers of a State

[1] 2 Dall 419 (1793)

[2] J Frankfurter dissenting in Larson *v* Domestic and Foreign Corp 337 U S 682 708 (1949)

[3] Hans *v* La 134 U S 1 (1890) Monaco *v* Miss 292 U S 313 (1934)

[4] Cohens *v* Va 6 Wheat 264 411-412 (1821)

[5] Osborn *v* B'k of U S 9 Wheat 738 858-859 868 (1824)

[6] *Ex parte* Young 209 U S 123 (1908) *See also* Home Tel & Tel Co *v* Los Angeles 227 U S 278 (1913) Terrace *v* Thompson 263 U S 197 (1923) Alabama Com *v* Southern R Co 341 U S 341 344 (1951) Georgia R *v* Redwine 342 U S 299 304-305 (1952)

involving what is conceded to be State property or suits asking for relief which clearly calls for the exercise of official authority cannot be maintained. Thus, in the leading case of Louisiana v. Jumel[7] in which a holder of State bonds sought to compel the State treasurer to apply a sinking fund that had been created under an earlier constitution for the payment of the bonds to such purpose after a new constitution had abolished this provision for retiring the bonds, the proceeding was held to be a suit against the State. "The relief asked," said the Court, "will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use in another, and they must raise more money by taxation when the same power has declared that it shall be done."[8] But mandamus proceedings to compel a State official to perform a "ministerial duty" which admits of no discretion are held not to be suits against the State since the official is regarded as acting in his individual capacity in failing to act according to law.[9]

The immunity of a State from suit is a privilege which it may waive at pleasure by voluntary submission to suit,[10] as distinguished from appearing in a similar suit to defend its officials,[11] and by general law consenting to suit in the federal courts. Such consent must be clear and specific and

[7] 107 U.S. 711 (1883). *See also* Christian v. Atlantic & N.C.R. Co., 133 U.S. 233 (1890).

[8] 107 U.S. at 721.

[9] Board of Liquidation v. McComb, 92 U.S. 531, 541 (1876). This was a case involving an injunction, but Justice Bradley regarded mandamus and injunction as correlative to each other in cases where the official unlawfully commits or omits an act. *See also* Rolston v. Missouri Fund Commissioners, 120 U.S. 390, 411 (1887), where it is held that an injunction would lie to restrain the sale of a railroad on the ground that a suit to compel a State Official to do what the law requires of him is not a suit against the State.

[10] Clark v. Barnard, 108 U.S. 436, 447 (1883); Ashton v. Cameron County Water Improvement Dist., 298 U.S. 513, 531 (1936).

[11] Farish v. State Banking Board, 235 U.S. 498 (1915); Missouri v. Fiske, 290 U.S. 18 (1933).

consent to suit in its own courts does not imply a waiver of immunity to suit in the federal courts [12] In short in consenting to be sued the States like the National Government may attach such conditions as they deem fit

AMENDMENT XII

The College of Electors" So-called

¶1 The electors shall meet in their respective States and vote by ballot for President and Vice President one of whom, at least shall not be an inhabitant of the same State with themselves they shall name in their ballots the person voted for as President and in distinct ballots the person voted for as Vice President and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice President and of the number of votes for each which lists they shall sign and certify and transmit sealed to the seat of the government of the United States directed to the President of the Senate The President of the Senate shall in the presence of the Senate and House of Representatives open all the certificates and the votes shall then be counted The person having the greatest number of votes for President shall be the President if such number be a majority of the whole number of electors appointed and if no person have such majority then from the persons having the highest numbers not exceeding three on the list of those voted for as President the House of Representatives shall choose immediately by ballot the President But in choosing the President the votes shall be taken by States the representation from each State having one vote a quorum for this purpose shall consist of a member or members from two thirds of the States and a majority of all the States shall be necessary to a choice And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them before the fourth day of March next following then the Vice President shall act as President as in the case of the death or other constitutional disability of the President

[12] Murray v Wilson Distilling Co 213 U S 151 172 (1909) citing Smith v Reeves 178 U S 436 (1900) Great Northern Life Ins Co v Read 322 U S 47 (1944) Kennecott Copper Corp v St Tax Com 327 U S 573 (1946)

¶2 The person having the greatest number of votes as Vice President shall be the Vice President if such number be a majority of the whole number of electors appointed and if no person have a majority then from the two highest numbers on the list the Senate shall choose the Vice President a quorum for the purpose shall consist of two thirds of the whole number of Senators and a majority of the whole number shall be necessary to a choice But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States

This amendment which supersedes ¶3 of Section I of Article II of the original Constitution was inserted on account of the tie between Jefferson and Burr in the election of 1800 The difference between the procedure which it defines and that which was laid down in the original Constitution is in the provision it makes for a separate designation by the Electors of their choices for President and Vice-President respectively The final sentence of ¶1 above has been in turn superseded today by Amendment XX

In consequence of the disputed election of 1876 Congress by an act passed in 1887 has laid down the rule that if the vote of a State is not certified by the governor under the seal thereof it shall not be counted unless both houses of Congress are favorable [1]

It was early supposed that the House of Representatives would be often called upon to choose a President but the political division of the country into two great parties has hitherto always prevented this except in 1800 and 1824 Should however, a strong third party appear the election might be frequently thrown into Congress with the result since the vote would be by States of enabling a small fraction of the population of the country to choose the President from the three candidates receiving the highest electoral vote The situation obviously calls for a constitutional amendment

It should be noted that no provision is made by this amendment for the situation which would result from a failure to choose either a President or Vice President an inadequacy which Amendment XX undertakes to cure

[1] U S Code tit 3 §17

Original Expectations

The mode of appointment of the Chief Magistrate of the United States Hamilton wrote in *Federalist* No 68 is almost the only part of the system of any consequence which has escaped without severe censure or which has received the slightest mark of approbation from its opponents Hamilton himself did not hesitate to affirm that if the manner of it be not perfect it is at least excellent being designed to guarantee that the choice of President should be by 'a small number of persons eminently fit to make a wise selection and to avoid 'cabal intrigue and corruption Actually the so-called College of Electors —a college which never meets—had come by the time that Amendment XII became a part of the Constitution to consist of party marionettes who have never exercised the least individual freedom of choice in circumstances that made their doing so a matter of the least importance in the world Indeed in 1872 the Democratic Electors from three States automatically cast their votes for the party candidate Horace Greeley on the very day he was carried to his grave

The Actuality

In Ray v Blair [2] decided April 15 1952 the Court had occasion to comment on the theory of the constitutional independence of the Elector which it did in these words History teaches that the Electors were expected to support the party nominees Experts in the history of government recognize the long standing practice Indeed more than twenty States do not print the names of the candidates for Electors on the general election ballot In view of such facts the Court declined to rule that it was unconstitutional for one seeking nomination as an Elector in a party primary to announce his choice for President beforehand thereby pledging himself

AMENDMENT XIII

SECTION 1

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly con-

[2] 343 U S 214 218 219 228 231 (1952)

victed, shall exist within the United States or any place subject to their jurisdiction

The historical importance of this amendment consists in the fact that it completed the abolition of African slavery in the United States but that has not been its sole importance The amendment is not in the words of the Court, 'a declaration in favor of a particular people It reaches every race and every individual and if in any respect it commits one race to the Nation it commits every race and every individual thereof Slavery or involuntary servitude of the Chinese of the Italian of the Anglo Saxon are as much within its compass as slavery or involuntary servitude of the African [1]

Peonage Outlawed Moreover, the words involuntary servitude have a larger meaning than slavery [2] Especially does this phrase ban peonage the essence of which is compulsory service in the payment of a debt [3] Consequently, an Alabama statute which imposed a criminal liability and subjected to imprisonment farm laborers who abandoned their employment to enter into similar employment with other persons was held to violate Amendment XIII as well as national legislation forbidding peonage[4] So it was held in 1905 and six years later the Court overturned another Alabama statute which made the refusal without just cause to perform the labor called for in a written contract or to refund the money advanced therefor *prima facie* evidence of an intent to defraud and punishable as a criminal offense[5] Subsequently other statutes of like tendency emanating from Southern legislatures have similarly succumbed to the Court s conception of involuntary servitude [6]

Meantime the Court has had several occasions to reject over extended conceptions of involuntary servitude Thus the denial of admission to public places such as

[1] Hodges v U S 203 U S 1 16-17 (1906) Bailey v Ala 219 U S 219 240-241 (1911)
[2] Slaughter House Cases 16 Wall 36 69 (1873)
[3] Bailey v Ala above at 242
[4] Clyatt v U.S 197 U.S 207 (1905) Act of March 2 1867 14 Stat 546
[5] Bailey v Ala. above
[6] United States v Reynolds 235 U.S 133 (1914) Taylor v Ga 315 U.S 25 (1942) Pollock v Williams 322 U.S 4 (1944)

inns restaurants and theatres or the segregation of races in public conveyances do not fall under the condemnation of Amendment XIII [7] nor do contracts for certain services which have from time immemorial been treated as exceptional although involving to a certain extent the surrender of personal liberty [8] nor does enforcement of those duties which individuals owe the State such as service in the army militia on the jury etc [9] Hence a State has inherent power to require every able bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without compensation [10] Nor was Mr James C Petrillo subjected to involuntary servitude in consequence of being forbidden by the Federal Communications Act to coerce compel or constrain licensees under the act to employ unneeded persons in the conduct of their broadcasting activities [11]

Things Not Outlawed

SECTION II

Congress shall have power to enforce this article by appropriate legislation

It should be noted that this amendment in contrast to the opening section of the Fourteenth Amendment just below lays down a rule of action for private persons no less than for the States In other words it is legislative in character as was the Eighteenth Amendment and accordingly in enforcing it Congress may enact penalties for the violation of its provisions by private persons and corporations without paying any attention to State laws on the same subject [1]

[7] Civil Rights Cases 109 U S 3 (1883) Plessy v Ferguson 163 U S 537 (1896)

[8] Robertson v Baldwin 165 U S 275 282 (1897)

[9] Butler v Perry 240 U S 328 333 (1916) *See also* Arver v U S (Selective Draft Cases) 245 U S 366 390 (1918) Work or fight laws such as States enacted during World War I which required male residents to be employed during the period of that war were sustained on similar grounds as were municipal ordinances enforced during the depression which compelled indigents physically able to perform manual labor to serve the municipality without compensation as a condition of receiving financial assistance *State v McClure 7 Boyce (Del) 265 Commonwealth v Pouliot* 292 Mass 229 198 N E 256 (1935)

[10] Butler v Perry above

[11] United States v Petrillo 332 U S 1 (1947) *Act of June 19 1934* as amended April 16 1946 U S Code tit 47 §506

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AMENDMENT XIV

SECTION 1

The Great Fourteenth Amendment

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws

The opening clause of this section makes national citizenship primary and State citizenship derivative therefrom The definition it lays down of citizenship at birth is not however exhaustive as was pointed out in connection with Congress s power to establish an uniform rule of naturalization

Subject to the jurisdiction thereof The children born to foreign diplomats in the United States are not subject to the jurisdiction of the United States and so are not citizens of the United State With this narrow exception all persons born in the United States are by the principle of Wong Kim Ark Case entitled to claim citizenship of the United States [1]

Judicial Repeal of the Privileges and Immunities Clause

The privileges or immunities of citizens of the United States were held in the famous Slaughter House cases decided soon after the Fourteenth Amendment was added to the Constitution to compromise only those privileges and immunities which the Constitution the laws and the treaties of the United States confer such a the right to engage in interstate and foreign commerce the right to appeal in proper cases to the national courts the right to protection abroad etc but not the fundamental rights which were said still to adhere exclusively to State citizenship [2]

Following this line of reasoning which renders the clause tautological the Court ruled in 1920 in United States v Wheeler [3] that the right to reside quietly within the State

[1] 169 U S 649 (1898)

[2] 16 Wall 36 71 77 79 (1873) *See also* Twining v N J 211 U S 78 97 (1908)

[3] 254 U S 281

of one's domicile is not a right which the National Government may protect against local mobs—plainly a most anomalous result In Hague v Committee for Industrial Organization[4] however in which a Jersey City ordinance requiring a permit for any assembly in the streets parks or public buildings of the city was held void two of the Justices based their opinion on this clause The privilege and immunity which they found to be infringed was the right of workingmen who are at the same time citizens of the United States to assemble for the purpose of discussing their newly acquired rights under the National Labor Relations Act and in Edwards v California four Justices agreed in 1941 that a State enactment which sought to exclude from the State indigent persons from the rest of the Union was as to citizens of the United States an abridgement of their privileges and immunities as such[5] As a matter of history there can be little question that it was the intention of the framers of the clause to transmute all the ordinary rights of citizenship in a free government into rights or national citizenship and thereby in effect to transfer their regulation and protection to the National Government[6]

Nor shall any State deprive any person of life liberty or property without due process of law By State is meant not only all agencies of State government but those of local government as well[7] when acting under color of official authority even though in a manner that is contrary to State law[8] While in a general way this clause imposes on the powers of the State the same kinds of limitations that the corresponding clause of Amendment V does on

[4] 307 U S 496 (1940) cf Davis v Mass 167 U S 43 (1897)

[5] 314 U S 160 where the decision overturning the State statute was based by a majority of the Court on the commerce clause For a temporary flare up of the privileges and immunities clause of Amendment XIV which was soon quenched cf Colgate v Harvey 296 U S 404 (1935) and Madden v Ky 309 U S 83 (1940)

[6] Horace Flack *The Adoption of the Fourteenth Amendment passim* (Johns Hopkins Press 1908)

[7] *Ex parte* Virginia 100 U S 337 (1879) Yick Wo v Hopkins 118 U S 356 (1886) *See also* Trenton v N J 262 U S 182 (1923)

[8] United States v Classic 313 U S 299 (1941) Screws v U S 325 U S 91 (1945) Cf Barney v City of N Y 193 U S 430 (1904)

Effect of Amendment XIV on State Criminal Law

the powers of the National Government there is this conspicuous difference that it does not subject State criminal procedure to the detailed requirements which the Fifth and Sixth Amendments lay upon the National Government For this reason the States remain free to remodel their procedural practices so long as they retain the essence of due process of law that is a fair trial in a court having jurisdiction of the case [9] So the mere forms of a fair trial will not suffice if the substance is lacking as in a trial which has proceeded to its foreordained conclusion under mob domination [10] or one in which a plea of guilty or confession was obtained from the accused by misrepresentation or recourse to third degree methods in judging of which matters the Court will go fully into the factual record made in the trial court [11] Likewise the Court will inquire closely whether the accused was denied assistance of counsel unfairly although whether this is because Amendment XIV adopts the assistance of counsel requirement of Amendment VI outright or only to the extent that such assistance is requisite to a fair trial remains somewhat uncertain In recent cases the latter more flexible test seems to have won out [12] And generally speaking if a State chooses to dispense with any or all of those ancient muniments of Anglo Saxon liberties —indictment by grand jury trial by jury and immunity from self incrimination—the Fourteenth Amendment will be found not to stand in the way provided the method of trial provided guarantees in the judgment of the Court a fair trial [13]

[9] *See* notes 10 13 below

[10] Moore *v* Dempsey 261 U S 86 (1923)

[11] Brown *v* Miss 297 U S 278 (1936) Chambers *v* Fla 309 U S 227 (1940) White *v* Tex 310 U S 530 (1940) Smith *v* O Grady 312 U S 329 (1941) Ashcraft *v* Tenn 322 U S 143 (1944) Malinski *v* N Y 324 U S 401 (1945) Whether a confession of an accused was coerced may be left to the jury to decide Stein *v* N Y 346 U S 156 (1953)

[12] Powell *v* Ala 287 U S 45 (1932) and Avery *v* Ala 308 U S 444 (1939) illustrate the care with which the court will at times go into the facts of such cases In Betts *v* Brady 316 U S 455 (1942) a divided Court found that a State is not required in every case to provide counsel for an indigent defendant *See also* Gibbs *v* Burke 337 U S 773 780 781 (1949)

[13] Hurtado *v* Calif 110 U S 516 (1884) Maxwell *v* Dow 176 U S 581 (1900) Twining *v* N J 211 U S 78 (1908) Adamson *v* Calif 332 U S 46 (1947) and not particularly Justice Cardozo s words in Palko *v* Conn 302 U S 319 (1937)

Judicial Supervision of the Police Power under Amendment XIV

The 'police power' is the power of the State 'to promote the public health safety morals and general welfare' or as it has been more simply and comprehensively described 'the power to govern men and things' [14]

Under the present day interpretation of 'liberty' 'property' and 'due process of law' this power is today confronted at every turn by the Court's power of judicial review Some statistics are pertinent in this connection During the first ten years of the Fourteenth Amendment hardly a dozen cases came before the Court under all of its clauses put together During the next twenty years when the laissez faire conception of governmental functions was being translated by the Bar into the phraseology of Constitutional Law, and gradually embodied in the decisions of the Court more than two hundred cases arose most of them under the 'due process of law' clause During the ensuing twelve years this number was more than doubled—a ratio which still holds substantially [15]

During this later period moreover an increasing rigor was to be discerned in the Court's standards especially where legislation on social and economic questions was concerned Prior to 1912 the Court had decided 98 cases involving this kind of legislation 'In only six of these did the Court hold the legislation unconstitutional From 1913 to 1920 the Court decided 27 cases of this type and held seven laws invalid while between 1920 and 1930 out of 53 cases the Court held against the legislation involved in fifteen [16]

The same result appears from another angle when we compare an early case in this field of judicial review with a comparatively recent one In Powell v Pennsylvania [17]

[14] License Cases 5 How 504 583 (1847) *See also* Charles River Bridge Co v Warren Bridge 11 Pet 420 547 548 (1837) the Slaughter House Cases cited above in note 2 Barbier v Connelly 113 U S 27 (1885) and scores of other cases

[15] Charles W Collins *The Fourteenth Amendment and the States* 188 206 (Boston 1912) *See also* Benjamin R. Twiss *Lawyers and the Constitution How Laissez Faire Came to the Supreme Court* chs II—VII (Princeton University Press 1942)

[16] Professor (now Justice) Felix Frankfurter The Supreme Court and the Public *Forum* June 1930 p 333

[17] 127 U S 678 (1888)

decided in 1888 the Court sustained an act prohibiting the manufacture and sale of oleomargarine taking the ground that it could not say from anything of which it may take judicial cognizance that oleomargarine was not injurious to the health and that this being the case the legislative determination of facts was conclusive Thirty six years later we find the Court setting aside a Nebraska statute requiring that bread be sold in pound and half pound loaves on its own independent finding that the allowance made by the statute for shrinkage of the loaves was too small Entering upon an elaborate discussion of the entire process of bread making the Court pronounced the act unnecessary for the protection of buyers against fraud and essentially unreasonable and arbitrary [18] In short the case furnishes a perfect example of what was above characterized as 'broad review and that in a connection with a case which had no apparent wide reaching implications of any sort

The Supreme Court as a Super Legislature

Commenting upon this general development the late Professor Kales once suggested that attorneys arguing due process cases before the Court ought to address the justices not as Your Honors but as Your Lordships [19] Similarly Senator Borah in the Senate debate on Mr Hughes's nomination for Chief Justice declared that the Supreme Court had become under the Fourteenth Amendment economic dictator in the United states [20] and in

act it must wait for a case to arise under it Yet a case is sure to arise sooner or later and under modern practice sooner *rather* than later One difference which lawyers are apt to stress between the point of view of a court exercising the power of judicial review and an executive exercising the veto power is that which is supposed to result from the doctrine of *stare decisis* A court it is said is apt to reflect that a present decision will be a future precedent But then executives are apt so to reflect too while the fact is that in the field of constitutional law the doctrine of *stare decisis* is today very shaky [21]

Social Philosophies of the Justices

The really distinctive thing about the Supreme Court considered as a governing body is that its make up usually changes very gradually so that for considerable intervals it will be found to be under the sway of a particular social philosophy the operation of which in important cases becomes a matter of fairly easy prediction on the part of those who follow the Court s work with some care The Court which set aside the Income Tax Act of 1894 and which retired the Sherman Act into disuse for some years by its decision in the Sugar Trust case[2] was al o the Court which ten years later in Lochner v New York [3] held void as unreasonable and arbitrary an act regulating the hours of labor in bakeries But another decade and a liberal court sustained without apparent effort a general ten hour law [4] and upheld compulsory workmen s compensation [5] Then from 1920 followed a Court of conservative outlook a Court prone to take a decidedly astringent view of all governmental powers except its own and to frown upon legislative projects whether State or national which were calculated to curtail freedom of business judgment The outlook

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No doubt there was an element of exaggeration in some or even all of these expressions—no doubt too it would be rather difficult to indicate very precisely just wherein the exaggeration lay The Court of course has no power to initiate legislation and even before it can veto an

[18] Burns Baking Co v Bryan 264 U.S 504 (1924) *See also* Weaver v Palmer Bros 270 U.S 402 (1926)

[19] 12 *American Political Science Review* 241 (1918)

[20] *New York Times* February 12 1930

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Summing up In consequence of the modern doctrine of due process of law as reasonable law *judicial review ceases to have definite statable limits* and while the extent to which the Court will recanvass the factual justification of a statute under the ' due process clauses of the Constitution often varies considerably as between cases yet this is a matter which in the last analysis depends upon the Court s own discretion and on nothing else

Rate and Price Regulation

In the famous case of Munn v Illinois[27] which was decided in 1876 the Court ruled that the State s police power extended to the regulation of the prices set by businesses affected with a public interest and it later held that whether a business was of this character depended on circumstances Thus the rental of houses in the City of Washington during wartime was held to be such a business as was the insurance business normally [28] Later however the Court virtually contracted the term to public utilities [29] holding as we saw earlier that their charges were subject to regulation so long as the price fixed by public authority yielded a fair return on the value of that which is used for the benefit of the public (see pp 34 35) Then in Neb

[26] The closest parallel to recent sweeping changes in the Court s membership is that which occurred during the two years immediately following Marshall s death when a new Chief Justice and five new Associate Justices came to the Bench On the constitutional revolution which ensued in consequence see Warren *The Supreme Court in United States History* II ch 2 It should be noted however that the constitutional revolution which has taken place since 1937 was really launched before any change in the Court s personnel The proof of this is to be found in Volume 301 of the *United States Supreme Court Reports* with which it is interesting to compare Volume XI of Peter s *Reports* exactly 100 years earlier *See* further the present writer s *Constitutional Revolution Ltd* (Claremont Colleges Claremont 1941)

[27] 94 U S 113

[28] Block v Hirsh 256 U S 135 (1921) German Alliance Co v Lewis 233 U S 389 (1914)

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bia v New York[30] which was decided early in 1934 the Court again altering its approach laid down the doctrine that there is no closed category of businesses affected with a public interest but that the State by virtue of its police power may regulate prices whenever it is reasonably necessary for it to do so in the public interest and on this basis was sustained a New York statute providing for the regulation of milk prices in the State Commencing at the time on this decision the late Hon James M Beck declared with some exaggeration however that the Court had calmly discarded its decisions of fifty years without even paying those decisions the obsequious respect of a funeral oration[31] Subsequent decisions further illustrate the new outlook[32]

Freedom of Speech and Press

During and after the first World War many State legislatures passed acts imposing restraints upon freedom of speech press and teaching and learning In deciding the question whether such measures were within the police power of the Court came early to adopt the theory that word liberty of the Fourteenth Amendment covers such freedom and hence protects them against unreasonable State Acts A statute forbidding the teaching of subjects in any but the English language was held void as to private schools[33] as was also an act which by requiring that all children attend the public schools particularly forbade their attending private schools[34] On the other hand the Court sustained legislation penalizing advocacy of the use of violence to bring about social and political changes[35] though it later qualified its endorsement with the doctrine that for a person to be validly held under such an act his inflammatory words must have come near to inciting to actual violence—the clear and present danger doctrine

[30] 291 U S 502 (1934)
[31] *Congressional Record* March 24 1934 p 5480 (unofficial paging)
[32] Highland Farms Dairy v Agnew 300 U S 608 (1937) Townsend v Yeomans 301 U S 441 (1937) Olsen v Neb 313 U S 236 (1941) Federal Power Commission v Hope Natural Gas Co 320 U S 591 (1944)
[33] Meyer v Neb 262 U.S 380 (1923)
[34] Pierce v Society of Sisters 268 U S 510 (1925)
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bia v New York[30] which was decided early in 1934 the Court again altering its approach laid down the doctrine that there is no closed category of 'businesses affected with a public interest' but that the State by virtue of its police power may regulate prices whenever it is 'reasonably necessary' for it to do so in the public interest and on this basis was sustained a New York statute providing for the regulation of milk prices in the State Commencing at the time on this decision the late Hon James M Beck declared with some exaggeration however that the Court had calmly discarded its decisions of fifty years without even paying those decisions the obsequious respect of a funeral oration[31] Subsequent decisions further illustrate the new outlook[32]

Freedom of Speech and Press

During and after the first World War many State legislatures passed acts imposing restraints upon freedom of speech press and teaching and learning In deciding the question whether such measures were within the police power of the Court came early to adopt the theory that word liberty of the Fourteenth Amendment covers such freedom and hence protects them against unreasonable State Acts A statute forbidding the teaching of subjects in any but the English language was held void as to private schools[33] as was also an act which by requiring that all children attend the public schools particularly forbade their attending private schools[34] On the other hand the Court sustained legislation penalizing advocacy of the use of violence to bring about social and political changes[35] though it later qualified its endorsement with the doctrine that for a person to be validly held under such an act his inflammatory words must have come near to inciting to actual violence—the 'clear and present danger' doctrine

[30] 291 U S 502 (1934)

[31] *Congressional Record* March 24 1934 p 5480 (unofficial paging)

[32] Highland Farms Dairy v Agnew 300 U.S 608 (1937) Townsend v Yeomans 301 U S 441 (1937) Olsen v Neb 313 U S 236 (1941) Federal Power Commission v Hope Natural Gas Co 320 U.S 591 (1944)

[33] Meyer v Neb 262 U S 390 (1923)

[34] Pierce v Society of Sisters 268 U.S 510 (1925)

[35] Gitlow v N Y 268 U.S 652 (1925) Whitney v Calif 274 U.S 357 (1927)

bor v Swing[45] decided in 1941 In the former the Court, speaking by Justice Murphy set aside an Alabama statute which as applied by the courts of that State forbade the peaceful picketing of the premises of anyone engaged in a lawful business In the circumstances of our times said the Justice the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution[46] In the Swing case the same doctrine was applied against an injunction by the courts of Illinois which was based on the rule of common law of the State forbidding resort to peaceful persuasion through picketing when there was no immediate employer employee relationship The case thus implied that the Court would undertake to recast the common law of the several States defining the purposes for which laborers may strike in combination without incurring the danger of being prosecuted for conspiracy[47] But in order to receive the protection of this new conception of liberty picketing must not be set in a background of violence[48] Nor are continuing representations unquestionably false constitutionally safeguarded albeit a little loose language now and then provided it is dissociated from violence is a different matter[49] Lastly by a vote of five Justices to four a State may not require labor organizers operating within its borders to register although as Justice Roberts pointed out for the dissenters other paid organizers whether for business or for charity could be required to identify themselves while Justice Jackson added the suggestion that the decision gave labor

[45] 312 U S 321

[46] 310 U S at 102. The Thornhill Case was immediately followed by Carlson v Calif 310 U S 106 in which a county ordinance was set aside for the same reason

[47] *See also* Carpenters and Joiners Union v Ritter s Cafe *et al* 315 U S 722 (1942) The Swing case and the Cantwell case are interesting as being the first cases in which the Court ever held a substantive rule of common law not to be due process of law Formerly conformity with the common law was deemed *la creme de la creme of due process Cf* American Railway Express Co v Ky 273 U.S 269 (1927) and cases there cited This remarkable feature of the Swing and Cantwell cases seems to have escaped the attention of the Court

[48] Milk Drivers Union v Meadowmoor Dairies Inc 312 U S 287 (1941)

[49] Cafeteria Employers Union v Gus Angelos 320 U.S 293 295 (1943)

a benefit of a sort which the Court has denied to employers in Labor Relations cases.[50]

Limits on the Right to Picket

For a brief period, moreover, strangers to the employer were accorded an almost equal freedom of communication by picketing.[51] Subsequent cases, however, have recognized that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech.[52] Without dissent the Court has held that a State may enjoin picketing designed to coerce the employer to violate State law by refusing to sell ice to non-union peddlers,[53] by interfering with the right of his employees to decide whether or not to join a union,[54] or by choosing a specified proportion of his employees from one race irrespective of merit.[55] By close divisions it also sustained the right of a State to forbid the conscription of neutrals by the picketing of a restaurant solely because the owner had contracted for the erection of a building (not connected with the restaurant and located some distance away) by a contractor who employed non-union men,[56] or the picketing of a shop operated by the owner without employees, to induce him to observe certain closing hours.[57] In this last case Justice Black distinguished Thornhill v. Alabama and other prior cases, saying: "It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. . . . Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements

[50] Thomas v. Collins, 323 U.S. 513, 545, 556 (1945).

[51] American Federation of Labor v. Swing, 312 U.S. 321 (1941); Bakery and Pastry Drivers v. Wohl, 315 U.S. 769 (1942); Cafeteria Employees Union v. Gus Angelos, 320 U.S. 293 (1943).

[52] Teamsters Union v. Hanke, 339 U.S. 470, 474 (1950).

[53] Giboney v. Empire Storage Co., 336 U.S. 490 (1949).

[54] Building Service Union v. Gazzam, 339 U.S. 532 (1950).

[55] Hughes v. Superior Court, 339 U.S. 460 (1950).

[56] Carpenters Union v. Ritter's Cafe, 315 U.S. 722, 723 (1942).

[57] Giboney v. Empire Storage Co., 336 U.S. 490 (1949).

of Pennsylvania in excluding from its schools children of the Jehovah s Witnesses who in the name of their beliefs refused to salute the flag[62] The subsequent record of the Court s holdings in this field is singularly erratic A decision in June 1942 sustaining the application to vendors of religious books and pamphlets of a non discriminatory license fee[63] was eleven months later vacated and formally rever ed[64] shortly thereafter a like fate overtook the decision in the Flag Salute case[65] In May 1943 the Court found that an ordinance of the city of Struthers Ohio which made it unlawful for anyone distributing literature to ring a doorbell or otherwise summon the dwellers of a residence to the door to receive such literature was violative of the Constitution when applied to distributors of leaflets advertising a religious meeting[66] But eight months later it sustained the application of Massachusetts child labor laws in the case of a nine year old girl who was permitted by her legal custodian to engage in preaching work and the sale of religious publications after hours[67]

The Court one su pects has not thought its problem quite through if indeed most of these cases pre ented a problem In this connection a statement by Justice Douglas in Murdock v Pennsylvania appears to be especially significant This form of religious activity that is proselytizing by the distribution of tracts etc he there asserts occupies the same estate under the First Amendment as do worship in the churches and preaching from the pulpits[68] In other words the right of religious enthusiasts to solicit funds and peddle their doctrinal wares in the streets to ring doorbells and disturb householders and to accost passersby and insult them in *their* religious beliefs stands on the same constitutional level as the right of people to resort to their own places of worship and listen to their chosen

[62] Minersville School Dist v Gobitis 310 U S 586 (1940)
[63] Jones v Opelika 316 U S 584 (1942)
[64] Same v same 319 U S 103 Murdock v Pa 319 U S 105 (1943)
[65] West Virginia State Bd of Educ v Barnette *et al* 319 U S 634 (1943) *see also* Taylor v Miss 319 U S 583
[66] Martin v Struthers 319 U S 141 (1943)
[67] Prince v Mass 321 U S 158 (1944)
[68] 319 U S at 109

teachers! If as is generally understood one man s right to swing his fists stops just short of where another man s no e begins a somewhat similar rule must be presumed to hold in the field of religious activities As Justice Jackson sensibly suggested the Court ought to ask itself what would be the effect if the right given these Witnesses should be exerci ed by all sects and denominations [69] Unfortunately in United States v Ballard (*see* p 195) Justice Jackson himself takes leave of common sense to indulge some high flown doubts that were evidently suggested to him by a perusal of William James s *The Will to Believe* [70] There is nevertheless one point on which the Court appears to have achieved unity to wit on the proposition that the Constitution does not protect people in uttering obscene profane or libellous words— fighting words —even when uttered with pious intent [71]

Clear and Present Danger" Contempt of Court

Another matter regarding which the Court s attitude was influenced by the clear aad present danger formula was that of contempt of the court In 1907 the Court speaking by Justice Holmes refused to review the conviction of an editor for contempt of court in publishing articles and car toons criticizing the action of the court in a pending case [72] It took the position that even if freedom of the press was protected against abridgment by the State a publication tending to obstruct the administration of justice was pun ishable irrespective of truth In recent years the Court not only has taken jurisdiction of cases of this order but has scrutinized the facts with great care and has not hesi tated to reverse the action of State Courts Bridges v California [73] is the leading case Enlarging upon the idea that clear and present danger is an appropriate guide in determining whether comment on pending cases can be punished Ju tice Black said We cannot start with the as sumption that publications of the kind here involved actu allv do threaten to change the nature of legal trials and that to preserve judicial impartiality it is necessary for

[69] Douglas v J annet e 319 U S 157 180 (1943)
[70] 32_ U S 78 93 94 (1944)
[71] Chaplinsky v N H 315 U S 568 (1942)
[72] Patterson v Colo 265 U S 455 [73] 314 U S 252 (1941)

judges to have a contempt power by which they can close all channels of public expre sion to all matters which touch upon pending cases We must therefore turn to the par ticular utterances here in question and the circumstances of their publication to determine to what extent the sub stantive evil of unfair administration of justice was a likely consequence and whether the degree of likelihood was sufficient to justify summary punishment [74] Speaking on behalf of four dissenting members Justice Frankfurter ob- jected A trial is not a free trade in ideas nor is the best test of truth in a courtroom the power of the thought to get itself accepted in the competition of the market We cannot read into the Fourteenth Amendment the free dom of speech and of the press protected by the First Amendment and at the same time read out age old means employed by states for ecuring the calm cour e of jus tice [75] On the whole nevertheless the Bridges case seems still to be law of the land [76]

[P]arks and [S]treets as Public Forums Incidental to certain of the cases above reviewed the main feature of others is the protection which the Court has erected in recent years for those who desire to use the streets and the public parks as th atres of discussion agita tion and propaganda dissemination In 1897 the Court had unanimously sustained an ordinance of the city of Bos- ton which provided that no person shall in or upon any of the public grounds make any public address etc ex cept in accordance with a pe mit of the Mayor quoting with approval the following language from the decision of the Massachusetts Supreme Judicial Court in the same ca e For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in the house When no proprietary right interferes the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses So it may take the less step of limiting the public use to certain

[74] *Ibid* 271 [75] 314 U S 283 284 (1941)

[76] *See* Pennekamp v Fla 328 U S 331 (1946) and Craig v Hecht 331 U S 367 (1947)

purposes.[77] Beginning, however, in 1938 the Court, under the leadership of Chief Justice Hughes, extended Blackstone's condemnation of censorship to a municipal ordinance forbidding any distribution of circulars, handbills, advertising, or literature of any kind within the city limits without permission of the city manager;[78] and ten years later an ordinance forbidding the use of sound amplification devices in the streets and public places except with the permission of the chief of police was held unconstitutional.[79] The decision was five to four, and eight months later a new majority held it to be a permissible exercise of legislative power to bar from the streets sound trucks amplified to a "loud and raucous" volume.[80] Two outstanding results of the Hughes crusade have been the overruling of the *Davis* case and that of the Mutual Film case, in which in 1915 it was held that the exhibition of motion pictures was "a business pure and simple, originated and conducted for profit" and hence not entitled to constitutional protection.[81] In 1948 this position was repudiated,[82] and in 1952 in the so-called "Miracle case" it was held that under the First and Fourteenth Amendments a State may not place a prior restraint on the showing of a film on the basis of a censor's finding that it was "sacrilegious," a word of highly uncertain connotation.[83]

The "Preferred Constitutional Values" Doctrine

What, it may be asked, has been the effect of the decision in the *Dennis* case[84] (*see* pp. 201-202) on the Court's jurisprudence touching freedom of speech in the States? Probably very little. The "clear and present danger" doctrine and the supporting idea that this freedom enjoyed a "preferred position" among constitutional values had come under strong attack from certain members of the Court prior to *Dennis*. The decision in 1949 in *Terminiello v. Chicago*[85]

[77] Davis *v.* Mass., 167 U.S. 43, 47.
[78] Lovell *v.* Griffin, 303 U.S. 444. *See also* Schneider *v.* State, 308 U.S. 147 (1939), and Jamison *v.* Tex., 318 U.S. 413 (1943).
[79] Saia *v.* N.Y., 334 U.S. 558 (1948).
[80] Kovacs *v.* Cooper, 336 U.S. 77 (1949).
[81] Mutual Film Corp. *v.* Ohio Industrial Com., 236 U.S. 230.
[82] United States *v.* Paramount Pictures, 334 *U.S. 131, 166.*
[83] Joseph Burstyn, Inc. *v.* Wilson, 343 U.S. *495. See also* Superior Films *v.* Dep't of Education, 346 U.S. 587 (1954).
[84] Dennis *v.* U.S., 341 U.S. 494.
[85] 337 U.S. 1 (1949).

in which a narrowly divided Court under leadership of Justice Douglas underwrote a near riot probably aided the reaction but even earlier Justice Frankfurter had asserted roundly that Justice Holmes had never used the phrase clear and present danger "to express a technical doctrine or to convey a formula for adjudicating cases"[86] and both he and Justice Jackson had sharply challenged the validity of the preferred position idea Said the latter "We cannot give some constitutional rights a preferred position without relegating others to a deferred position"[87]

State Loyalty Acts

Dennis stemmed in part no doubt from such questionings which may also have prompted certain later holdings under Amendment XIV On the same day with Dennis was sustained the right of a local government to bar from public employment advocates of the violent overthrow of government and of members of organizations which do so and to exact a loyalty oath from its employees[88] and later decisions uphold the right of a State to exclude similar categories from teaching in the public schools[89] And in Beauharnais v Illinois[90] a statute making it a crime to exhibit in public places any publication which portrays depravity criminality etc as characteristic of any race or creed or exposes the citizens thereof to contempt or obloquy was sustained as creating a species of criminal libel against which under the common law the only available defense is that of good motives and justifiable ends At the same time it should not be inferred that the Court has incontinently abandoned its protective role The Miracle case was decided at the same term with Beau

[86] *See* Pennekamp v Fla 323 U S 516 529 530 (1945)

[87] Brinegar v U S 338 U S 160 180 (1949) For J Frankfurter s protest against the mischievous phrase *see* Kovacs v Cooper 336 U S 77 90 (1949) The conception of superior or preferred constitutional rights seems to have been suggested in rather different terms by J Cardozo in his opinion for the Court in Palko v Conn 302 U S 319 327 (1937) *See also* C J Stone s opinion in United States v Carolen Products Co 304 U.S 144 152 (1938)

[89] Garner v Los Angeles Board 341 U S 716 (1951)

[89] Adler v Board of Education 342 U S 485 (1952) Said J Minton for the Court "A teacher works in a sensitive area in the schoolroom There he shapes the attitude of young minds toward the society in which he lives. In this the State has a vital concern." *Ibid* 493

[90] 343 U.S 250 (1952)

harnais and a few months earlier a divided Court set aside convictions of persons to whom permits had been 'arbitrarily denied for the holding of religious meetings in public places but who had gone ahead just the same[91]

And in the field of morals legislation too the Court has recently encountered difficulty In a case decided February 25 1957 it held void a Michigan statute which made it an offense to render available for the general reading public a book found to have a potentially deleterious influence upon youth Quipped Justice Frankfurter speaking for eight members of the Court The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children Less than four months later on June 24 1957 speaking again by Justice Frankfurter the Court sustaind 5 to 4 a New York statute authorizing the Chief Executive to prevent the sale or distribution of obscene written or printed matter What the algebraic sum of these two holdings is still remains for the Court to resolve[91a]

Due Process of Law' as Jurisdiction

In two classes of cases due process of law has the meaning of *Jurisdiction* the general idea being that a State has normally no right to attempt to exercise its governmental powers upon persons and property situated beyond its boundaries

The first class embraces cases in which a defendant in a personal action in a State court challenges the validity of a judgment rendered against him on the ground that not having been within the forum State at the time he was not served there with the proper papers Once such a judgment was *ipso facto* void as having been rendered without jurisdiction[9] But nearly a century ago the force of this rule was broken as regards foreign corporations (those chartered by other States) by the doctrine that since a State may absolutely exclude such ' persons it ought to be pre

[91] Niemotke v Md 340 U S 268 (1951) Kunz v N Y *ibid* 290 *See also* Fowler v R I 345 U S 67 (1953) *Cf* Feiner v N Y 340 U S 315 (1951) which is a virtual repudiation of the Terminiello decision

[91a] Butler v Michigan 352 U S —— and Kingsley Books v Brown —— U S ——

[9] *See e g* Pennoyer v Neff 95 U S 714 (1877)

sumed that those admitted by it had consented to be sued in its courts [93] Then somewhat later this doctrine became impaired in turn by the doctrine that a State may not exclude foreign corporations from engaging in interstate commerce while as regards natural persons who are citizens of sister States it was never applicable anyway on account of the right of entry which is accorded them by Article IV Section II The result is that within the last few years the Court has developed a much more flexible principle regarding service of process in personal actions both those involving corporate defendants and those involving natural person This principle is that nowadays due process requires only that in order to subject a defendant to a judgment *in personam* if he be not present within the territory of the forum he must have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice Such contacts existing substituted service (i e other than personal service) will satisfy the requirements of the due process clause provided it is reasonably calculated to give him [the defendant] actual notice of the proceedings and an opportunity to be heard [94]

Substituted Service

Substituted service is also adequate in an action concerning land which is the property of a non resident since such actions are *in rem* and the *res* is within the court s jurisdiction Also a State may by statute make non residents operating motor vehicles within its borders liable to suit for any damage they do there provided a designated State officer is served with the proper papers and a reasonable effort is made to notify the non resident defendant of the proceedings and an opportunity thus given him to be heard [95] It is not unlikely that in due course this kind of case will be explained as falling within the minimum contacts rule given above

[93] Lafayette Ins Co v French 18 How 404 (1855)

[94] Milliken v Meyer 311 U S 457 (1940) International Shoe Co v Wash 326 U S 310 (1945) Polizzi v Cowles Mag Inc 345 U S 663 (1953)

[95] Hess v pawloski 274 U S 352 (1927) Wuchter v Pizzutti 276 U S 13 (1928) C J Taft s opinion in the latter case is valuable for its exposition of the law of substituted service

races in these fields of instructions[106] Moreover said the Court in 1950 speaking with reference to a segregated Negro law school such an institution could not offer its students those qualities which are incapable of objective measurement but which make for greatness in a law school[107] In a group of cases decided on May 17 1954 it was held that like considerations apply with added force to children in grade and high schools To separate them Said Chief Justice Warren speaking for a unanimous Court from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone We conclude that in the field of education the doctrine of separate but equal has no place Separate educational facilities are inherently unequal[108] Subsequent orders of the Court touching cases still pending suggest that the ultimate rule may be that all services provided at public expense must be available on a non segregation basis

[106] Missouri *ex rel* Gaines v Canada 305 U S 337 (1938) Sipuel v Okla 332 U S 631 (1948) Sweatt v Painter 339 U S 629 (1950) McLaurin v Okla St Regents 339 U S 637 (1950)

[107] 339 U S at 634

[108] The cases originated in Kansas South Carolina Virginia and Delaware They first reached the Court in 1952 and were put over for reargument in the 1953 term Of this reargument the Chief Justice remarked It was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868 It covered exhaustively consideration of the Amendment in Congress ratification by the States then existing practices in racial segregation and the views of proponents and opponents of the Amendment

This discussion and our own investigation convince us that although these sources cast some light it is not enough to resolve the problem with which we are faced

At best they are inconclusive The most avid proponents of the post war Amendments undoubtedly intended them to remove all legal distinctions among all persons born or naturalized in the United States

Their opponents just as certainly were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect

An additional reason for the inclusive nature of the Amendment s history with respect to segregated schools is the status of public education at that time In the South the movem nt toward free common schools supported by general taxation had not yet taken hold Education of white children was largely in the hands of private groups Education of Negroes was almost nonexistent and practically all of the race was illiterate In fact any education of Negroes was forbidden by law in some states

Indeed that the Court was headed for some such result without the necessity of invoking sociological data is indicated by certain earlier holdings including those reached by it in implementing the separate but equal rule (*see* note 106 *supra*) Thus even under the law as it stood when the Desegregation Cases were decided the two races might not be segregated by public authority as to their places of abode and while private covenants forbidding the transfer of real property to persons of a desig

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'Today in contrast many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world It is true that public education has already advanced further in the North but the effect of the Amendment on Northern States was generally ignored in the Congressional debates

Even in the North the conditions of public education did not approximate those existing today The curriculum was usually rudimentary ungraded schools were common in rural areas the school term was but three months a year in many states and compulsory school attendance was virtually unknown

As a consequence it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education

Later he adds Today education is perhaps the most important function of state and local governments Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society It is required in the performance of our most basic public responsibilities even service in the armed forces It is the very foundation of good citizenship

Today it is a principal instrument in awakening the child to cultural values in preparing him for later professional training and in helping him to adjust normally to his environment citing the following works K B Clark *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth 1950) Witmer and Kotinsky *Personality in the Making* (1952) Ch 6 Deutscher and Chein The Psychological Effects of Enforced Segregation A Survey of Social Science Opinion 26 *J Psychol* 259 (1948) Chein What Are the Psychological Effects of Segregation Under Conditions of Equal Facilities? 3 *Int J Opinion and Attitude Res* 229 (1949) Brameld *Educational Costs in Discrimination and National Welfare* (McIver ed 1949) 44 48 Frazier *The Negro in the United States* (1949) 674 681 and Myrdal *An American Dilemma* (1944)

A unique feature of the case is that the Court s decision on the constitutional issue is not followed by a decree of enforcement The Court was undoubtedly well advised to announce its holding on merits in advance of an effort to devise measures for putting the same into effect In this connection *see* the valuable article by Professors Leflar and Davis of the University of Arkansas School of Law Segregation in the Public Schools—1953 67 *Harvard Law Review* 377-435 (January 1954)

A fifth case from the District of Columbia was disposed of in line with the holdings in the State cases under the due process clause of Amendment V

nated race or color have been held to be lawful [109] yet the enforcement thereof by a State through its courts being a State act, would violate the equal protection clause [110] And of course neither race may be denied the generally recognized civil rights the right to own and possess property to make contracts to serve on juries [111] etc

Furthermore the clause is not merely a restraint on legislative power but affords it a guiding principle Hence the provisions of the recent New York Civil Rights Law which prohibit any labor organization from discriminating by reason of race or color or creed in the admission or treatment of members have been held as applied to postal clerks violative neither of the Fourteenth Amendment nor of any powers or legislation of the National Government Likewise it supplies a principle which the national courts must follow in the interpretation of the Railway Labor Act with the result that a collective bargaining agreement discriminating against Negro firemen must be held violative of the Act [112]

Corporations as Persons

As was just remarked corporations are persons within the meaning of the Fourteenth Amendment and so are entitled to the equal protection of the laws But for a foreign corporation to be entitled to equal treatment with the corporations chartered by a State it must be subject to the jurisdiction thereof [113] The importance moreover of this reading of the term the historical validity of which has been disputed [114] is much less than is sometimes supposed It does not mean that the law may not exact special duties of corporations but it does mean that such duties must bear some reasonable relation to the fact that they are corporations and to the nature of the business

[109] Buchanan v Warley 245 U S 60 (1917) Corrigan v Buckley 271 U S 327 (1926)

[110] Shelley v Kramer 334 U S 1 (1948) ff d in Barrows v Jackson 346 U S 249 (1953)

[111] Straud r v W Va 100 U S 303 (1880)

[112] Railway Mail Assoc v Corsi 326 U S 88 (1945) Steele v Louisville & N R Co 323 U S 192 (1944)

[113] Santa Clara County v So Pac R R Co 118 U S 394 (1886) Hanover Fire Ins Co v Carr 272 U S 494 (1926)

[114] *See* the interesting dissenting opinion of Justice Black in Connecticut Gen L Ins Co v Johnson 303 U S 77 at 82 (1938) and references

in which they are engaged. Thus in view of the special dangers to which the railroad business exposes the public railroad companies may be required to stand the heavy expense of elevating their grade crossings[115] On the other hand a railroad may not be required to carry selected commodities at a loss[116]

It ought to be added that the clause is least effective as a restraint on the taxing power of the State. Almost any classification made in a tax measure will be sustained by the Court whether it is relevant to the business of raising revenue or proceeds from some ulterior motive[117]

State Means All Who Act for It

As we saw above the term State in this clause means any agency whereby the State exercises its powers. It thus includes any State or local official when acting under color of his office[118] and in deciding whether a State has violated the above provisions the Court is always free to go behind the face of the law and inquire into the fairness of its actual enforcement[119] This rule originally laid down in Yick Wo v Hopkins received more recent illustration in one of the Scottsboro cases where an indictment returned by a grand jury of whites in a county of Alabama in which no member of a considerable Negro population had ever been called for jury service was held void although the Alabama statute governing the matter contained no discrimination between the two races[120]

SECTION II

Representatives shall be apportioned among the several States according to their respective numbers counting the whole

115 Chicago & Alton R R Co v Tranbarger 238 U S 67 (1915) and cases there cited

116 Northern Pacific Ry v No Dak 236 U S 585 (1915)

117 *See* State Tax Com'rs v Jackson 283 U S 527 (1931) and Great Atlantic and Pacific Tea Co v Grosjean 301 U S 412 (1937) and cases cited there

118 *Ex parte* Virginia 100 U S 347 (1879) Screws v U S 325 U S 91 (1945) *also* Julius Cohen The Screws Case Federal Protection of Negro Rights 46 *Columbia Law Review* 94 106 (1946)

119 Yick Wo v Hopkins 118 U S 356 (1886) Reagan v Farmers Loan & T Co 154 U S 390 (1894) Tarrance v Fla 118 U S 519 (1903)

120 Norris v Ala 294 U S 587 (1935) To the same effect are Hale v Ky 303 U S 613 (1938) Pierre v La 305 U S 354 (1939) and Smith v Tex 311 U S 178 (1940) Avery v Ga 345 U S 559 (1953) *Cf* Brown v Allen 344 U S 443 (1953)

umber of persons in each State excluding Indians not axed But when the right to vote at any election for the hoice of electors for President and Vice President of the Jnited States Representatives in Congress the executive ind judicial officers of a State or the members of the legis ature thereof is denied to any of the male inhabitants of uch State being twenty one years of age and citizens of the United States or in any way abridged except for participa tion in rebellion or other crime the basis of representation therein shall be reduced in the proportion which the num ber of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State

SECTION III

No person shall be a Senator or Representative in Congress or elector of President and Vice President or hold any office civil or military under the United States or under any State who having previously taken an oath as a member of Con gress or as an officer of the United States or as a member of any State legislature or as an executive or judicial of ficer of any State to support the Constitution of the United States shall have engaged in insurrection or rebellion against the same or given aid or comfort to the enemies thereof But Congress may by a vote of two thirds of each house remove such disability

SECTION IV

The validity of the public debt of the United States authorized by law including debts incurred for payment of pensions and bounties for services in suppressing insurrection or re bellion shall not be questioned But neither the United States nor any State shall assume or pay any debt or obliga tion incurred in aid of insurrection or rebellion against the United States or any claim for the loss or emancipation of any slave but all such debts obligations and claims shall be held illegal and void

These sections are today for the most part of historical interest only

SECTION V

The Congress shall have power to enforce by appropriate legis- lation the provisions of this article

Congressional Enforcement of the Amendment

The full extent of the powers of Congress under this section in the regulation and protection of civil rights has never been conclusively determined. In the famous Civil Rights cases[1] decided nearly three quarters of a century ago the Court held void an act of Congress forbidding inns, railroads, and theaters to discriminate between persons on the ground of race, the basis of the decision being the proposition that the prohibitions of the opening section of the Fourteenth Amendment were intended to reach only positive acts of State authorities derogatory of the rights protected by the amendment—not acts of private individuals or acts of omission by the State itself. In the case of Truax v. Corrigan[2] on the other hand, which was decided in 1921, the Court declared that the same clauses require a certain minimum of protection from the State for all classes and persons. Following this later pronouncement, it would seem, should a State conspicuously fail in providing security of person or property as regard any class within its borders, Congress under the above section might validly interpose with legislation calculated to remedy the defect. For "*equal* protection of the laws" implies normally *some* effort at least to enforce the laws.

Nor is it only the "equal protection" clause which Congress is empowered to implement by "appropriate legislation," but all the provisions of this article. The outstanding legislation having this purpose was first enacted in 1866 and as since amended appears today as Section 20 of the United States Criminal Code.[3] It reads thus: "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizen

[1] 109 U.S. 3 (1883).

[2] 257 U.S. 312 (1921).

[3] U.S. Code, tit. 18, §52. See also §88.

shall be fined not more than $ 1 000 or imprisoned not more than one year or both

Recent Resuscitation of this Power

After lying dormant for many years this provision was resuscitated and reanimated in 1914 by the decision in the Classic case (*see* p 278) and has more recently received in Screws v United States[4] an application which possibly opens up to it a notable career in the future Speaking for the Court Justice Douglas recited the circumstances of a case of extreme and wanton brutality by a Georgia sheriff and two assistants in effecting the arrest of a young Negro who died in consequence of this treatment

Screws and his co defendants were indicted under Section 20 for having under color of the laws of Georgia willfully caused Hall to beprived of rights privileges or immunities secured or protected to him by the Fourteenth Amendment—the right not to be deprived of life without due process of law the right to be tried upon the charge on which he was arrested by due process of law and if found guilty to be punished in accordance with the laws of Georgia

While the indictmeut was held to fall within the terms of Section 20, the conviction of Screws and his companions was reversed on the ground that the trial judge should have charged the jury that to convict they must find the accused to have had the *specific* intention of depriving Hall of his constitutional right This charge being given in a second trial the jury acquitted Two later decisions under Section 20 however qualify the requirement of specific intention with the doctrine of the common law that the intent is presumed and inferred from the result of the action Altogether these cases are notable for their conception of State action and hence as a matrix for Congressional legislation of the same general character as Section 20 but couched in more definite terms[5]

[4] *See* note 113 above

[5] *See* Williams v U.S 341 U S 97 (1951) Koehler *v* U S 342 U.S 852 (1951) *also* Robert L. Hale Unconstitutional Acts as Federal Crimes 60 *Harvard Law Review* 65 109 (November 1946) *also* Milton R Konvitz *The Constitution and Civil Rights* (Columbia University Press 1947)

THE CONSTITUTION

AMENDMENT XV

ECTION 1

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race color or previous condition of servitude

An Affirmative Grant of Rights

At the outset the Court emphasized only the negative aspects of this amendment The Fifteenth Amendment it asserted did not confer the right [to vote] upon any one but merely invested the citizens of the United States with a new constitutional right which is exemption from discrimination in the exercise of the elective franchise on account of race color or previous condition of servitude 1 Within less than ten years however in *Ex parte* Yarbrough 2 the Court ventured to read into the amendment and affirmative as well as a negative purpo e Conceding that this article had originally been construed as giving no affirmative right to the colored man to vote and as having been designed primarily to prevent discrimination against him Justice Miller in behalf of his colleagues conceded that under some circumstances it may operate as the immediate source of a right to vote In all cases where the former slave holding States had not removed from their Constitutions the words white man as a qualification for voting this provision did in effect confer on him the right to vote becau e it annulled the discriminating word *white* and thus left him in the enjoyment of the same right as white persons And such would be the effect of any future constitutional provision of a State which should give the right of voting exclu ively to white people

Disallowance of Nullifying Expedients

The subsequent history of the Fifteenth Amendment has been largely a record of belated judicial condemnation of various attempts by States to disfranchi e the Negro either

1 United States v Reese 92 U.S 214 217 218 (1876) United States v Cruikshank 92 U.S 542 556 (1876)

2 110 U.S 651 665 (1884) citing Neal v Delaware 103 U.S 3 0 389 (1881) This affirmative view was later reiterated in Guinn & Beal v US 238 U.S 347 363 (1915)

overtly through statutory enactment or covertly through inequitable administration of their electoral laws or by toleration of discriminatory membership practices of political parties Of several such devices one of the first to be held unconstitutional was the grandfather clause Without expressly disfranchising the Negro but with a view to facilitating the permanent placement of white residents on the voting lists while continuing to interpose severe obstacles upon Negroes seeking qualification as voters several States beginning in 1895 enacted temporary laws whereby persons who were voters or descendants of voters on January 1 1867 could be registered notwithstanding their inability to meet any literacy requirements Unable because of the date to avail themselves of the same exemption Negroes were thus left exposed to disfranchisement on grounds of illiteracy while whites no less illiterate were enabled to become permanent voters With the achievement of this intended result most States permitted their laws to lapse but Oklahoma s grandfather clause was enacted as a permanent amendment to the State constitution and when presented with an opportunity to pass on its validity a unanimous Court condemned the standard of voting thus established as recreating and perpetuating the very conditions which the (Fifteenth) Amendment was intended to destroy [3] Nor when Oklahoma in 1916 followed up this defeat with a statute which provided that all persons except those who voted in 1914 who were qualified to vote in 1916 but who failed to register between April 30 and May 11 1916 should be perpetually disfranchised did the Court experience any difficulty in holding the same to be repugnant to the amendment [4] That amendment Justice Frankfurter declared nullifies sophisticated as well as simple minded modes of discrimination It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race [5]

[3] Guinn & Beal v U S 238 U S 347 360 363 364 (1915)
[4] Lane v Wilson 307 U S 268 (1939) [5] *Ibid* 275

Primaries as Elections

When, however, it was first called upon to deal with the exclusion of Negroes from participation in primary elections, the Court displayed indecision. Prior to its becoming convinced that primary contests were in fact elections,[6] the Court had relied upon the equal protection clause to strike down a Texas White Primary Law[7] and a subsequent Texas statute which contributed to a like exclusion by limiting voting in primaries to members of States political parties as determined by the central committees thereof.[8] When exclusion of Negroes was thereafter maintained by political parties acting not in obedience to any statutory command, this discrimination was for a time viewed as not constituting State action and so as not prohibited by either the Fourteenth or the Fifteenth Amendments.[9] Nine years later this holding was reversed when the Court in Smith v. Allwright[10] declared that where the selection of candidates for public office is entrusted by statute to political parties, a political party in making its selection at a primary election is a State agency, and hence may not under this amendment exclude Negroes from such elections.

Initially the Court held that literacy tests drafted so as to apply alike to all applicants for the voting franchise would be deemed to be fair on their face and in the absence of proof of discriminatory enforcement could not be viewed as denying the equal protection of the laws guaranteed by the Fourteenth Amendment.[11] Recently, how-

[6] United States v. Classic, 313 U.S. 299 (1941); Smith v. Allwright, 321 U.S. 649 (1944).

[7] Nixon v. Herndon, 273 U.S. 536 (1927).

[8] Nixon v. Condon, 286 U.S. 73, 89 (1932).

[9] Grovey v. Townsend, 295 U.S. 45, 55 (1935).

[10] 321 U.S. 649 (1944). Notwithstanding that the South Carolina Legislature after the decision in Smith v. Allwright repealed all statutory provisions regulating primary elections and political organizations conducting them, a political party thus freed of control is not to be regarded as a private club and for that reason exempt from the constitutional prohibitions against racial discrimination contained in Amendment XV. Rice v. Elmore, 165 F. (2d) 387 (1947), *certiorari* denied 333 U.S. 875 (1948). A South Carolina political party which excluded Negroes from membership required that white as well as Negro qualified voters as a prerequisite for voting in its primary take an oath that would support separation of the races. Not surprisingly, this ingenious (?) maneuver was held void. Terry v. Adams, 345 U.S. 461 (1953).

[11] Williams v. Miss., 170 U.S. 213, 220 (1898).

ever the Boswell amendment to the constitution of Alabama which provided that only persons who understood and could explain the Constitution of the United States to the reasonable satisfaction of boards of registrars was found both in its object as well as in the manner of its administration to be contrary to the Fifteenth Amendment The legislative history of the Alabama provision disclosed said the Court that the ambiguity inherent in the phrase understand and explain was purposeful and intended as a grant of arbitrary power in an attempt to obviate the consequences of Smith v Allwright[12]

SECTION II

The Congress shall have power to enforce this article by appropriate legislation

In the protection of the right conferred by this amendment Congress passed the Enforcement Act of 1870 which however was largely nullified by a Supreme Court decision in 1876[1] On September 9 of the current year Congress enacted the Civil Rights Act of 1957 The measure creates a Commission on Civil Rights whose duty it is to investigate allegations that certain citizens of the United States are being deprived of the right to vote and have their votes counted on account of race color religion or national origin and when such allegations are found to be substantiated the Attorney General may institute a civil action or other proper proceeding for preventive relief including prosecutions for criminal contempt by a judge acting without a jury[2]

[12] Davis v Schnell 81 F Supp 872 878 880 (1949) affirmed 336 U S 933 (1949)

[1] In the early case of United States v Reese 92 U S 214 218 (1876) the Enforcement Act of 1870 (16 Stat 140) which penalized State officers for refusing to receive the vote of any qualified citizen was held to be constitutionally inapplicable to support a prosecution of such officers for having prevented a qualified Negro from voting

[2] Public Law 85 315 85th Congress H R 6127 (Sept 9 1957)

AMENDMENT XVI

A Judicial Decision Recalled

The Congress shall have power to lay and collect taxes on incomes from whatever source derived without apportionment among the several States and without regard to any census or enumeration

The ratification of this amendment was the direct consequence of the decision in 1895[1] whereby the attempt of Congress the previous year to tax incomes uniformly throughout the United States[2] was held by a divided court to be unconstitutional A tax on incomes derived from property[3] the Court declared was a direct tax which Congress under the terms of Article I Section 2 clause 3 and Section 9 clause 4 could impose only by the rule of apportionment according to population although scarcely fifteen years prior the Justices had unanimously sustained[4] the collection of a similar tax during the Civil War[5]

Decisions Undermining the Pollock Case

During the interim between the Pollock decision in 1895 and the ratification of the Sixteenth Amendment in 1913 the Court gave evidence of a growing awareness of the dangerous consequences to national solvency which that holding threatened and partially circumvented it either by taking refuge in redefinitions of direct tax or and more especially by emphasizing virtually to the exclusion of the former the history of excise taxation In a series of cases including Nicol v Ames[6] Knowlton v Moore[7] and Patton v Brady[8] the Court held the following taxes to have been levied merely upon one of the incidents of ownership and hence to be excises a tax which involved affixing revenue stamps to memoranda evidencing the sale of merchandise on commodity exchanges

[1] Pollock v Farmers Loan & Trust Co 157 U S 429 (1895) 158 U S (1895)

[2] 28 Stat 509

[3] The Court conceded that taxes on incomes from professions trades employments or vocations levied by this act were excise taxes and therefore valid The entire statute however was voided on the ground that Congress never intended to permit the entire burden of the tax to be borne by professions trades employments or vocations after real estate and personal property had been exempted 158 U S 601 635 (1895)

[4] Springer v U S 102 U S 586 (1881) [5] 13 Stat 223 (1864)

[6] 173 U S 509 (1899) [7] 178 U S 41 (1900) [8] 184 U S 608 (1902)

an inheritance tax and a war revenue tax upon tobacco on which the hitherto imposed excise tax had already been paid and which was held by the manufacturer for resale

Thanks to these endeavors the Court found it possible in 1911 to sustain a corporate income tax as an excise measured by income on the privilege of doing business in corporate form[9] But while the adoption of the Sixteenth Amendment put a stop to speculation whether the Court would not eventually overrule Pollock it is interesting to note that in its initial appraisal of the amendment it characterized income taxes as inherently indirect and hence subject to the rule of uniformity the same as exci es duties and imports until they were removed therefrom and placed under the direct class —removed that is by the Court itself[10]

The Court s Interpretation of Amendment XVI

Building upon definitions formulated in cases constru ing the Corporation Tax Act of 1909 the Court initially described income as the gain derived from capital from labor or from both combined inclusive of the profit gained through a sale or conversion of capital assets [11] Moreover any gain not accruing prior to 1913 was held to be taxable income for the year in which it was realized by sale or conversion of the property to which it had accrued [1] while corporate dividends in the shape of money or of the stock of another corporation were held to be taxable income of the stockholder for the year in which he received them regardless of when the profits against which they were voted had accrued to the corporation [13] A stock dividend issued against a corporate surplus however was held not to be income in the hands of the stockholder since it left the stockholder s share of the surplus still under the control of the corporate management [14]

[9] Flint *v* Stone Tracey Co 220 U S 107 (1911)

[10] Brushaber *v* Union Pac R Co 240 U S 1 18 19 (1916) *See also* Stanton v Baltic Min Co 240 U S 103 112

[11] Stratton s Independence v Howbert 231 U S 399 415 (1914) Doyle *v* Mitchell Bros Co 247 U S 179 (1918)

[1] Eisner *v* Macomber 252 U S 189 (1920) Bowers *v* Kerbaugh Empire Co 271 U S 170 (1926)

[13] Lynch *v* Hornby 247 U S 339 (1918)

[14] Eisner v Macomber cited above Helvering v Griffiths 318 U.S 371 (1943) which maintains the rule laid down in Eisner *v* Macomber is

Although empowered to tax incomes from whatever source derived Congress is not precluded from leaving some incomes untaxed[15] Conversely it may condition, limit or deny deductions from gross income to arrive at the net that it chooses to tax [16] and in 1927 the Court ruled that gains derived from illicit traffic in liquor were taxable income under the Act of 1921[17] Said Justice Holmes for the unanimous Court We see no reason why the fact that a business as unlawful should exempt it from paying the taxes that if lawful it would have to pay [18] However in Commissioner v Wilcox[19] decided in 1946 Justice Murphy speaking for a majority of the Court held that embezzled money was not taxable income to the embezzler although any gain he derived from the use of it would be Justice Burton dissented on the basis of the Sullivan case and in 1952 a sharply divided court cutting loose from the metaphysics of the Wilcox ca e held that Congress had the power under Amendment XVI to tax as income monies received by an extortioner[20]

While Congress s power to tax incomes is relieved by this amendment from the rule of apportionment it still remains subject to the due process clause of Amendment V which would forbid any obviously arbitrary classification for this purpose Thus an act of Congress which taxed incomes of Republicans at a higher rate than tho e of Democrats would presumably be invalid But incomes of corporate persons may be taxed on a different basis than those of natural persons and large incomes may be and are taxed at progressively higher rates than smaller incomes Also Congress may in order to compel corporations to distribute their profits and thereby render them taxable in the hands of stockholders levy a special tax on such

based immediately on U S Code tit 26 § 115 (f) (1) *See also* Moline Properties Inc v Com r of Int Rev 319 U S 436 (1943) where the corporate entity conception which is basic to the decision in the Eisner holding is endorsed

[15] Brushaber v Union Pac R Co 240 U S 1 (1916)

[16] Helvering v Independent L Ins Co 292 U S 371 381 (1934) Helvering v Winmill 305 U S 79 84 (1938)

[17] United States v Sullivan 274 U S 259 (1927) [18] 274 U S at 263

[19] 327 U S 404 (1946) [20] Rutkin v U S 343 U S 130 (1952)

accumulated profits in the hands of the corporation without transcending its powers under the Sixteenth Amendment[21] or violating the Fifth Amendment

The question has occasionally mooted whether the separate incomes of a husband and wife may be taxed as one joint income and so in effect, at a higher rate than income of the same size of unmarried person the tax being progressive Some years ago the Court overturned a Wisconsin tax of this description on the ground that the due process clause of Amendment XIV forbade the taxation of one person s income or property by reference to those of another person The Justices however dissented in an opinion by Justice Holmes which argued that such a tax was constitutional first in the light of a thousand years of history the reference being to the common law doctrine that the income and property of the wife were at the disposal of the husband secondly because husbands and wives do actually get the benefit of one another s income thirdly as a means of avoiding tax evasions[22] The second and third reasons at least are persuasive that such a classification for purposes of income taxation would not be so utterly unreasonable as to fall under the ban of the Fifth Amendment which it should be remembered does not contain an equal protection clause and a recent decision which holds that the entire value of a community property (property held in common by husband and wife may be subjected to the federal estate tax upon the death of either spouse confirms this conclusion[23]

AMENDMENT XVII

¶1 The Senate of the United States shall be composed of two Senators from each State elected by the people thereof for six years and each Senator shall have one vote The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature

[21] Helvering v National Grocery Co 304 U.S 282 (1938) Helvering v National Steel Rolling Mills Inc 311 U.S 46 (1940)
[22] Hoeper v Tax Com of Wis 284 U S 206 (1931)
[23] Fernandez v Wiener 326 U S 340 (1945)

¶2 When vacancies happen in the representation of any State in the Senate the executive authority of such State shall issue writs of election to fill such vacancies *Provided* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct

¶3 This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution

This amendment as was noted before supersedes Article I Section III ¶1 Very shortly after its ratification the point was established that if a person possessed the qualifications requisite for voting for a Senator his right to vote for such an officer was not derived merely from the constitution and laws of the State in which they are chosen but has its foundation in the Constitution of the United States[1] Consistently with this view federal courts more recently have declared that when local party authorities acting pursuant to regulations prescribed by a party s State executive committee refused to permit a Negro on account of his race to voice in a primary to select candidate for the office of United States Senator they deprived him of a right secured to him by the Constitution and laws in violation of this amendment But an Illinois statute which required that a petition to form and to nominate candidate for a new political party be signed by at least 25 000 voters from at least 50 counties was held not to impair any right under Amendment XVII notwithstanding that 52 per cent of the State s voters were residents of one county 87 per cent were residents of 49 counties and only 13 per cent resided in the 53 least populous counties[3]

[1] United States v Aczel 219 F (1915) citing *Ex parte* Yarbrough, 110 U S 651 (1884)

[2] Chapman v King 154 F (2d) 460 (1946) *certiorari* denied 327 U S 800 (1946)

[3] MacDougall v Green 335 U S 281 (1948)

AMENDMENT XVIII

SECTION I

After one year from the ratification of this article the manufacture sale or transportation of intoxicating liquors within the importation thereof into or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited

SECTION II

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation

SECTION III

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States as provided in the Constitution within seven years from the date of the submission hereof to the States by the Congress

This section was no proper part of the amendment but was really a part of the Constitutional resolution of submission and was rightly so treated by the Supreme Court[1] How indeed could an inoperative amendment operate to render itself inoperative?

The entire amendment was repealed in 1933 by the Twenty first Amendment (*see* below pp 287 289) Some of the questions however which were raised under Article V and the Fourth and Fifth Amendments by the efforts first to enforce and then to get rid of National Prohibition are still of interest and are treated in earlier pages of this volume (*see* pp 176 177)

AMENDMENT XIX

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex

Congress shall have power to enforce this article by appropriate legislation

This amendment which consummates a reform that had been long under way in the States was passed by the House

[1] Dillon v Gloss 256 U.S 368 (1921)

SECTION II

The transportation or importation into any State Territor or possession of the United States for delivery or use there of intoxicating liquors in violation of the laws thereof hereby prohibited

SECTION III

This article shall be inoperative unless it shall have been ra fied as an amendment to the Constitution by conventions the several States as provided in the Constitution witl seven years from the date of the submission hereof to t States by the Congress

This amendment was proposed by Congress February 1933 to conventions to be called in the several States was proclaimed to be in effect December 5 of the same ye having been ratified by 36 States a record for celerity

Decisions Interpreting the Amendment

Decisions interpreting the amendment to date fall i two general categories decisions which assert the unl ited character of State power within the precincts mar out by Section II decisions which define those preci with greater particularity On the one hand the Court said the amendment authorizes a State to impose a lic fee upon the importation into it of liquor from wi h to discriminate as to what liquors it shall permit to be ported to retaliate against such discriminations[3] an general to legislate unfettered by the commerce or other clause of the Constitution respecting liquor ii duced into it from without[4] On the other hand amendment does not the Court holds enable a Stat regulate the sale of liquor in a national park over whi had ceded jurisdiction to the United States[5] nor do disable Congress from regulating the importation of liq from abroad[6] and when a State seeks to control the pa *through* it of liquor coming from another State and tined for a third State, it is no longer exercising any p

[1] State Bd of Equalization v Young s Market Co 299 U S 59 (
[2] Mahoney v Joseph Triner Corp 304 U S 401 (1938)
[3] Indianapolis Brewing Co v Liquor Control Com s n of Mic U S 391 (1938)
[4] Ziffrin v Reeves 308 U.S 132 (1939)
[5] Collins v Yosemite Park and Curry Co 304 U S 518 (1938)
[6] James & Co v Morgenthau 307 U S 171 (1939)

granted it by the amendment but its customary police power Its regulations therefore must be reasonable in the judgment of the Court and may be set aside by Congress under the commerce clause[7]

AMENDMENT XXII

No person shall be elected to the office of President more than twice and no person who has held the office of President or acted as President for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once But this article shall not apply to any person holding the office of President when this article was proposed by the Congress and shall not prevent any person who may be holding the office of President or acting as President during the term within which this article becomes operative from holding the office of President or acting as President during the remainder of such term

This amendment was proposed by Congress on March 24 1947 and ratification of it by the required three fourths of the States was completed on February 27 1951 On March 1st Jess Larson Administrator of General Services certified its adoption[1] Formerly this ervice was performed by the Secretary of State

The following amendment was proposed to the legislatures of the several States by Congress on June 2 1924 and is still pending

SECTION I

The Congress shall have power to limit regulate and prohibit the labor of persons under eighteen years of age

SECTION II

The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress

The case of Coleman *v* Miller[1] dealt with in earlier pages arose in connection with this proposal (*see* p 175)

[7] Duckworth *v* Ark 314 U S 390 (1941) Carter *v* Va 321 U.S 131 (1944)

[1] 16 Fed Reg 2019

[1] 307 U S 433 (1939).

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[1] State Bd of Equalization v Young s Market Co 299 U S 59 (1936)
[2] Mahoney v Joseph Triner Corp 304 U S 401 (1938)
[3] Indianapolis Brewing Co v Liquor Control Com s n of Mich 305 U S 391 (1938)
[4] Ziffrin v Reeves 308 U S 132 (1939)
[5] Collins v Yosemite Park and Curry Co 304 U S 518 (1938)
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[1] 307 U S 433 (1939)

THE CONSTITUTION

PREAMBLE

We, *the people of the United States* in order to form a more perfect union establish justice insure domestic tranquility provide for the common defense promote the general welfare and secure the blessings of liberty to ourselves and our posterity do ordain and establish this Constitution for the United States of America

ARTICLE I

SECTION I

All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives

SECTION II

[1] The House of Representatives shall be composed of members chosen every second year by the people of the several States and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature

[2] No person shall be a Representative who shall not have attained to the age of twenty five years and been seven years a citizen of the United States and who shall not when elected be an inhabitant of that State in which he shall be chosen

[3] Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers which shall be determined by adding to the whole number of free persons including those bound to service for a term of years and excluding Indians not taxed three fifths of all other persons The actual enumeration shall be made within three years after the first meeting of the Congress of the United States and within every subsequent term of ten years in such manner as they shall by law direct The number of Representatives shall not exceed one for every thirty thousand but each State shall have at least one Representative and until such enumeration shall be made the State of New Hampshire shall be entitled to choose three Massachusetts eight Rhode Island and Providence Plantations one Connecticut five New York six New

Jersey four Pennsylvania eight Delaware one Maryland six Virginia ten North California five South California five and Georgia three

[4] When vacancies happen in the representation from any State the executive authority thereof shall issue writs of election to fill such vacancies

[5] The House of Representatives shall choose their Speaker and other officers and shall have the sole power of impeachment

SECTION III

[1] The Senate of the United States shall be composed of two Senators from each State chosen by the legislature thereof for six years and each Senator shall have one vote

[2] Immediately after they shall be assembled in consequence of the first election they shall be divided as equally as may be into three classes The seats of the Senators of the first class shall be vacated at the expiration of the second year of the second class at the expiration of the fourth year and of the third class at the expiration of the sixth year so that one-third may be chosen every second year and if vacancies happen by resignation or otherwise during the recess of the legislature of any State the executive thereof may make temporary appointments until the next meeting of the legislature which shall then fill such vacancies

[3] No person shall be a Senator who shall not have attained to the age of thirty years and been nine years a citizen of the United States and who shall not when elected be an inhabitant of that State for which he shall be chosen

[4] The Vice-President of the United States shall be President of the Senate but shall have no vote unless they be equally divided

[5] The Senate shall choose their other officers and also a President *pro tempore* in the absence of the Vice President or when he shall exercise the office of President of the United States

[6] The Senate shall have the sole power to try all impeachments When sitting for that purpose they shall be on oath or affirmation When the President of the United States is tried the Chief Justice shall preside and no person shall be convicted without the concurrence of two thirds of the members present

[7] Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to

hold and enjoy any office of honor trust or profit under the United States but the party convicted shall nevertheless be liable and subject to indictment trial judgment and punishment according to law

SECTION IV

[1] The times places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof but the Congress may at any time by law make or alter such regulations except as to the places of choosing Senators

[2] The Congress shall assemble at least once in every year and such meeting shall be on the first Monday in December unless they shall by law appoint a different day

SECTION V

[1] Each House shall be the judge of the elections returns and qualifications of its own members and a majority of each shall constitute a quorum to do business but a smaller number may adjourn from day to day and may be authorized to compel the attendance of absent members in such manner and under such penalties as each House may provide

[2] Each House may determine the rules of its proceedings punish its members for disorderly behaviour and with the concurrence of two thirds expel a member

[3] Each House shall keep a journal of its proceedings and from time to time publish the same excepting such parts as may in their judgment require secrecy and the yeas and nays of the members of either House on any question shall at the desire of one fifth of those present be entered on the journal

[4] Neither House during the session of Congress shall without the consent of the other adjourn for more than three days nor to any other place than that in which the two Houses shall be sitting

SECTION VI

[1] The Senators and Representatives shall receive a compensation for their services to be ascertained by law and paid out of the Treasury of the United States They shall in all cases except treason felony and breach of the peace be privileged from arrest during their attendance at the session of their respective Houses and in going to and returning from the same and for any speech or debate in either House they shall not be questioned in any other place

[2] No Senator or Representative shall during the time for which he was elected be appointed to any civil office under the authority of the United States which shall have been created or the emoluments whereof shall have been increased during such time and no person holding any office under the United States shall be member of either House during his continuance in office

SECTION VII

[1] All bills for raising revenue shall originate in the House of Representatives but the Senate may propose or concur with amendment as on other bills

[2] Every bill which shall have passed the House of Representatives and the Senate shall before it become a law be presented to the President of the United States if he approve he shall sign it but if not he shall return it with his objections to that House in which it shall have originated who shall enter the objections at large on their journal and proceed to reconsider it If after such reconsideration two thirds of that House shall agree to pass the bill it shall be sent together with the objections to the other House by which it shall likewise be reconsidered and if approved by two thirds of the House it shall become law But in all such cases the vote of both Houses shall be determined by yeas and nays and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively If any bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him the same shall be a law in like manner as if he had signed it unless the Congress by their adjournment prevent its return in which case it shall not be a law

[3] Every order resolution or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States and before the same shall take effect shall be approved by him or being disapproved by him shall be repassed by two thirds of the Senate and House of Representatives according to the rules and limitations prescribed in the case of a bill

SECTION VIII

[1] The Congress shall have power to lay and collect taxes duties imposts and excise to pay the debts and provide for

the common defense and general welfare of the United States but all duties imposts and excises shall be uniform throughout the United States

[2] To borrow money on the credit of the United States

[3] To regulate commerce with foreign nations and among the several States and with the Indian tribes

[4] To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States

[5] To coin money regulate the value thereof and of foreign coin and fix the standard of weights and measures

[6] To provide for the punishment of counterfeiting the securities and current coin of the United States

[7] To establish post offices and post roads

[8] To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries

[9] To constitute tribunals inferior to the Supreme Court

[10] To define and punish piracies and felonies committed on the high seas and offenses against the law of nations

[11] To declare war grant letters of marque and reprisal and make rules concerning captures on land and water

[12] To raise and support armies but no appropriation of money to that use shall be for a longer term than two years

[13] To provide and maintain a navy

[14] To make rules for the government and regulation of the land and naval forces

[15] To provide for calling forth the militia to execute the laws of the Union suppress insurrections and repel invasions

[16] To provide for organizing arming and disciplining the militia and for governing such part of them as may be employed in the service of the United States reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress

[17] To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular States and the acceptance of Congress become the seat of the Government of the United States and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of forts magazines arsenals dockyards and other needful buildings

[18] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof

SECTION IX

[1] The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibted by the Congress prior to the year one thousand eight hundred and eight but a tax or duty may be imposed on such importation not exceeding ten dollars for each person

[2] The privilege of the writ of habeas corpus shall not be suspended unless when in ca es of rebellion or invasion the public safety may require it

[3] No bill of attainder or ex post facto law shall be passed

[4] No capitation or other direct tax shall be laid unless in proportion to the cen us or enumeration hereinbefore di rected to be taken

[5] No tax or duty shall be laid on articles exported from any State

[6] No preference shall be given by any regulation of com merce or revenue to the ports of one State over those of an other nor shall vessels bound to or from one State be obliged to enter clear or pay duties in another

[7] No money shall be drawn from the Treasury but in con sequences of appropriations made by law and a regular state ment and account of the receipts and expenditures of all public money shall be published from time to time

[8] No title of nobility hall be granted by the United Sta-tes and no person holding any office of profit or trust under them shall without the consent of the Congress accept of any present emolument office or title of any kind whatever from any king prince or foreign state

SECTION X

[1] No State shall enter into any treaty allowance or con federation grant letters of marque and reprisal coin money emit bills of credit make anything but gold and silver coin a tender in payment of debts pass any bill of attainder ex post facto law or law impairing the obligation of contracts or grant any title of nobility

[2] No State shall without the consent of the Congress lay any imports or duties on imports or exports except what may

be absolutely necessary for executing its inspection laws and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States and all such laws shall be subject to the revision and control of the Congress

[3] No State shall without the consent of Congress lay any duty of tonnage keep troops and ships of war in time of peace enter into any agreement or compact with another State or with a foreign power or engage in war unless actually invaded or in such imminent danger as will admit of delay

ARTICLE II

SECTION I

[1] The executive power shall be vested in a President of the United State of America He shall hold his office during the term of four years and together with the Vice President chosen for the same term be elected as follows

[2] Each State shall appoint in such manner as the legislature thereof may direct a number of Electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress but no Senator or Representative or person holding an office of trust or profit under the United States shall be appointed an Elector

[3] The Electors shall meet in their respective States and vote by ballot for two persons of whom one at least shall not be an inhabitant of the same State with themselves And they shall make a list of all the persons voted for and of the number of votes for each which list they shall sign and certify and transmit sealed to the seat of government of the United States directed to the President of the Senate The President of the Senate shall in the presence of the Senate and House of Representatives open all the certificates and the votes shall then be counted The person having the greatest number of votes shall be the President if such number may be a majority of the whole number of Electors appointed and if there be more than one who have such majority and have an equal number of votes then the House of Representatives shall immediately choose by ballot one of them for President and if no person have a majority then from the five highest on the list the said House shall in like manner choose the President But in choosing the President the votes shall be taken by States the representation from each State having one vote a quorum for this

purpose shall consist of a member or members from two thirds of the States and a majority of all the States shall be necessary to a choice In every case after the choice of the President the person having the greatest number of votes of the Electors shall be the Vice President But if there should remain two or more who have equal votes the Senate shall choose from them by ballot the Vice President

[4] The Congress may determine the time of choosing the Electors and the day on which they shall give their votes which day shall be the same throughout the United States

[5] No person except a natural born citizen or citizen of the United States at the time of the adoption of this Constitution shall be eligible to the office of President neither shall any person be eligible to that office who shall not have attained to the age of thirty five years and been fourteen years a resident within the United States

[6] In case of the removal of the President from office or of his death resignation or inability to discharge the powers and duties of the said office the same shall devolve on the Vice President and the Congress may by law provide for the case of removal death resignation or inability both of the President and Vice President declaring what officer shall then act as President and such officer shall act accordingly until the disability be removed or a President shall be elected

[7] The President shall at stated times receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected and he shall not receive within that period any other emolument from the United States or any of them

[8] Before he enter on the execution of his office he shall take the following oath or affirmation

I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States and will to the best of my ability preserve protect and defend the Constitution of the United States

SECTION II

[1] The President shall be Commander in Chief of the Army and Navy of the United States and of the militia of the several States when called into the actual service of the United States he may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices

and he shall have power to grant reprieves and pardons for offenses against the United States, except in case of impeachment

[2] He shall have power by and with the advice and consent of the Senate to make treaties provided two-thirds of the Senators present concur and he shall nominate and by and with the advice and consent of the Senate shall appoint ambassadors other public ministers and consul judges of the Supreme Court and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone in the courts of law or in the heads of departments

[3] The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions which shall expire at the end of their next session

SECTION III

He shall from time to time give to the Congress information of the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient he may on extraordinary occasions convene both Houses or either of them and in case of disagreement between them with respect to the time of adjournment he may adjourn them to such time as he shall think proper he shall receive ambassadors and other public ministers he shall take care that the laws be faithfully executed and shall commission all the officers of the United States

SECTION IV

The President Vice President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason bribery or other high crimes and misdemeanors

ARTICLE III

SECTION I

The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish The judges both of the Supreme and inferior courts shall hold their offices during good behavior and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office

SECTION II

[1] The judicial power shall extend to all cases in law and equity arising under this Constitution the laws of the United States and treaties made or which shall be made under their authority to all cases affecting ambassadors other public ministers and consuls to all cases of admiralty and maritime jurisdiction to controversies to which the United States shall be a party to controversies between two or more States between a State and citizens of another State between citizens of different States between citizens of the same State claiming lands under grants of different States and between a State or the citizens thereof and foriegn States citizens or subjects

[2] In all cases affecting ambassadors other public ministers and consuls and those in which a State shall be party the Supreme Court shall have original jurisdiction In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact with such exceptions and under such regulations as the Congress shall make

[3] The trial of all crimes except in cases of impeachment shall be by jury and such trial shall be held in the State where the said crimes hall have been committed but when not committed within any State the trial shall be at such place or places as the Congress may by law have directed

SECTION III

[1] Treason against the United States shall consist only in levying war against them or in adhering to their enemies giving them aid and comfort No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court

[2] The Congress shall have power to declare the punishment of treason but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attained

ARTICLE IV

SECTION I

Full faith and credit shall be given in each State to the public acts records and judicial proceedings of every other State And the Congress may by general laws prescribe the manner in which such acts records and proceedings shall be proved and the effect thereof

SECTION II

[1] The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States

[2] A person charged in any State with treason felony or other crime who shall flee from justice and be found in another State shall on demand of the executive authority of the State from which he fled be delivered up to be removed to the State having jurisdiction of the crime

[3] No person held to service or labor in one State under the laws thereof escaping into another shall in consequence of any law or regulation therein be discharged from such service or labor but shall be delivered up on claim to the party to whom such service or labor may be due

SECTION III

(1) New States may be admitted by the Congress into this Union but no new State shall be formed or erected within the jurisdiction of any other State nor any State be formed by the junction of two or more States or parts of States without the consent of the legislatures of the States concerned as well as of the Congress

(2) The Congress shall have power to dispose of and make all needfull rules and regulations respecting the territory or other property belonging to the United States and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State

SECTION IV

The United States shall guarantee to every State in this Union a republican form of government and shall protect each of them against invasion and on application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence

ARTICLE V

The Congress whenever two thirds of both Houses shall deem it necessary shall propose amendments to this Constitution or on the application of the legislatures of two thirds of the several States shall call a convention for proposing amendments which in either case shall be valid to all intents and purposes as part of this Constitution when ratified by the legislatures of three fourths of the several States or by conventions in three fourths thereof as the one or the other mode

of ratification may be proposed by the Congress provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the Ninth Section of the First Article and that no State without its consent shall be deprived of its equal suffrage in the Senate

ARTICLE VI

[1] All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation

[2] This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land and the judges in every State shall be bound thereby anything in the Constitution or laws of any State to the contrary notwithstanding

[3] The Senators and Representatives before mentioned and the members of the several State legislatures and all executive and judicial officers both of the United States and of the several States shall be bound by oath or affirmation to support this Constitution but no religious test shall ever be required as a qualification to any office or public trust under the United States

ARTICLE VII

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same

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AMENDMENT I

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances

AMENDMENT II

A well regulated militia being necessary to the security of a free State the right of the people to keep and bear arms shall not be infringed

AMENDMENT III

No soldier shall in time of peace be quartered in any house without the consent of the owner nor in time of war but in a manner to be prescribed by law

AMENDMENT IV

The right of the people to be secure in their persons houses papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized

AMENDMENT V

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life liberty or property without due process of law nor shall private property be taken for public use without just compensation

AMENDMENT VI

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense

AMENDMENT VII

In suits at common law where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law

AMENDMENT VIII

Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted

AMENDMENT IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people

AMENDMENT X

The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people

AMENDMENT XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state

AMENDMENT XII

[1] The Electors shall meet in their respective States and vote by ballot for President and Vice President one of whom at least shall not be an inhabitant of the same State with themselves they shall name in their ballots the person voted for as President and in distinct ballots the person voted for as Vice President and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President and of the number of votes for each which lists they shall sign and certify and transmit sealed to the seat of the government of the United States directed to the President of the Senate The President of the Senate shall in the presence of the Senate and House of Representatives open all the certificates and the votes shall then be counted The person having the greatest number of votes for President shall be the President if such number be a majority of the whole number of Electors appointed and if no person have such majority then from the persons having the highest numbers not exceeding three on the list of those voted for as President the House of Representatives shall choose immediately by ballot the President But in choosing the President the votes shall be taken

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AMENDMENT XII

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by States the representation from each State having one vote a quorum for this purpose shall consist of a member or members from two thirds of the States and a majority of all the States shall be necessary to a choice And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them before the fourth day of March next following then the Vice President shall act as President as in the case of the death or other constitutional disability of the President

[2] The person having the greatest number of votes as Vice President shall be the Vice President if such number be a majority of the whole number of Electors appointed and if no person have a majority then from the two highest numbers on the list the Senate shall choose the Vice-President a quorum for the purpose shall consist of two thirds of the whole number of Senators and a majority of the whole number shall be necessary to a choice But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States

AMENDMENT XIII

SECTION I

Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction

SECTION II

Congress shall have power to enforce this article by appropriate legislation

AMENDMENT XIV

SECTION I

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws

AMENDMENT XV

SECTION I

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race color or previous condition of servitude

SECTION II

The Congress shall have the power to enforce this article by appropriate legislation

AMENDMENT XVI

The Congress shall have power to lay and collect taxes on incomes from whatever source derived without apportionment among the several States and without regard to any census or enumeration

AMENDMENT XVII

SECTION I

The Senate of the United States shall be composed of two Senators from each State elected by the people thereof for six years and each Senator shall have one vote The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures

SECTION II

When vacancies happen in the representation of any State in the Senate the executive authority of such State shall issue writs of election to fill such vacancies Provided that the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct

SECTION III

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution

AMENDMENT XVIII

SECTION I

After one year from the ratification of this article the manufacture sale or transportation of intoxicating liquors within

the importation thereof into or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited

SECTION II

The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation

SECTION III

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress

AMENDMENT XIX

SECTION I

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex

SECTION II

Congress shall have power to enforce this article by appropriate legislation

AMENDMENT XX

SECTION I

The terms of the President and Vice President shall end at noon on the 20th day of January and the terms of Senators and Representatives at noon on the 3rd day of January of the years in which such terms would have ended if this article had not been ratified and the terms of their successors shall then begin

SECTION II

The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day

SECTION III

If at the time fixed for the beginning of the term of the President the President elect shall have died the Vice President elect shall become President If a President shall not have been chosen before the time fixed for the beginning of his

term or if the President elect shall have failed to qualify then the Vice President elect shall act as President until a President shall have qualified and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified declaring who shall then act as President or the manne in which one who is to act shall be selected and such person shall act accordingly until a President or Vice President shall have qualified

SECTION IV

The Congress may be law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them and for the case of death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them

SECTION V

Sections I and II shall take effect on the 15th day of October following the ratification of this article

SECTION VI

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three fourths of the several States within seven years from the date of its submission

AMENDMENT XXI

SECTION I

The eighteenth article of amendment to the Constitution of the United States is hereby repealed

SECTION II

The transportation or importation into any State territory or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof is hereby prohibited

SECTION III

This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States as provided in the constitution within seven years from the date of the submission hereof to the States by the Congress

AMENDMENT XXII

No person shall be elected to the office of President more than twice and no person who has held the office of President, or acted as President for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once But this Article shall not apply to any person holding the office of President when this Article was Proposed by the Congress and shall not prevent any person who may be holding the office of President or acting as President during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term

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